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VOL. 3107

United States
Court of Appeals
for the Ninth Circuit

See ALSO
3106 ✓

PACIFIC TOW BOAT COMPANY, E. W.
STUCHELL, WILLIAM D. CARPENTER,
HARRY W. STUCHELL, JR.; M. A. WY-
MAN, D. E. WYMAN and M. H. WYMAN,
Co-Partners Doing Business as Eclipse Lumber
Co.,

Appellants.

vs.

STATES MARINE CORPORATION OF DELA-
WARE,

Appellee.

Transcript of Record
In Two Volumes
Volume II
(Pages 289 to 591)

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

JUN 11 1959

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The Court: 174. There is only a short paragraph which relates to the statement that, "The libel charges that between 3:00 and 4:00 o'clock in the afternoon while the libelant's lighter Alfred Collins was being moved astern from alongside the steamer Chalmette which lay on the southerly side of Pier 25, the steamer's propeller was suddenly set in motion and came in contact with the starboard quarter of the lighter, breaking some planks and causing her afterwards to sink, while the libelant's lighter was being moved towards the bulkhead from alongside the steamer Chalmette which lay on the side of the pier." In other words, while the libelant's tug Collins, the moving vessel, was being [247] moved from alongside the moored vessel the moored vessel's propeller was suddenly set in motion and came in contact with the starboard quarter of the moored vessel. Where does that state a line?

Mr. Howard: I don't have the case before me but I notice, your Honor——

The Court: I will let you see the case now.

Mr. Howard: I notice the quotation at the top of Page 12 of my brief from that case mentions the fact that instead of keeping her off by additional lines, which implies that there were lines secured.

The Court: I hope the case throws some light because I am looking for light on it. I have not read the case thoroughly except I have looked at the syllabus. I am doing this now to let Counsel know what the Court thinks it needs in the way of authorities in their briefs. Do you understand?

Mr. Howard: Yes, your Honor.

The Court: I am not deciding the case now, I am just trying to let you know what the Court feels it needs that I have not already received. Will you pause just a minute? I want to get that 1935 A. M. C.

(Brief pause.)

The Court: Have you seen that case?

Mr. Howard: Yes, your Honor. [248]

The Court: Is that the one you referred to?

Mr. Howard: Yes; it is.

The Court: Did it have the lines in position in the situation as they were here?

Mr. Howard: The syllabus of the case states that, "A scow belonging to the lighterage company was lying moored to the side of the Hektor."

The Court: In other words, the moving ship, so-called, was moored, is that right?

Mr. Howard: Yes, your Honor. The ship was at the dock, moored to the dock, and the syllabus says, "A scow belonging to a lighterage company was lying moored to the"—ship.

The Court: Lying moored to the moored ship, and that is what the respondents claim was the situation here.

Mr. Howard: The syllabus goes on to state that, "Employees of the stevedore company moved the scow by hand aft along the side of the ship."

The Court: The employees of who?

Mr. Howard: Of the stevedore company, "moved the scow by hand aft along the side of the ship."

The Court: That was an affirmative act by someone not in the employ of the ship, I assume?

Mr. Howard: That's right, your Honor. [249]

The Court: And not in the employ of the moving tug?

Mr. Howard: That's correct, your Honor. And the Court found that there was no liability on the ship in that situation. The Court did find the stevedoring contractor liable for negligent moving of the scow under the stern of the ship.

The Court: Did it find the moving tug or the moving vessel or the owners of it liable for negligence?

Mr. Howard: No.

The Court: Then I do not see that that is a patent case on the fact, do you?

Mr. Howard: This was cited in the brief to show the nonliability of the steamer, not to show the liability of the tug or the barge.

The Court: Very well.

Mr. Howard: The other case, your Honor, which we discussed earlier, the Chalmette case in 52 Federal——

The Court: 52 Federal or 54 Federal?

Mr. Howard: 52 Federal.

The Court: Yes; that is right, the Chalmette is in 52.

Mr. Howard: Yes, your Honor. [250]

The Court: Page 174.

Mr. Howard: That case indicates that a lighter had come alongside the vessel and was discharging cargo and before the vessel was ready to depart

people on the lighter attempted to move it alongside the ship by means of the lines. There was no tug involved there, apparently. The men were moving it on the lighter either as a self-propelled lighter or else by manipulating the lines. It is not clear from the opinion.

The Court: From what vessel to what vessel were the lines extending?

Mr. Howard: The lines were apparently extended from the lighter to the ship.

The Court: Anyway they were between the moored ship and the servicing vessel. It was moved and was in motion at the time of the accident, therefore it was the moving vessel, is that not right?

Mr. Howard: Yes, your Honor. The opinion states, "The master of the lighter testifies that before proceeding to haul his lighter astern"—from which I gather that the movement of the lighter was originated by the man who was on the lighter or the scow, but by means of manipulating the lines between the ship and the lighter, and the opinion concludes at [251] the end in the part which I believe I have quoted that, "The lighter should have protected against damage coming under the propeller or rudder of the ship, among other things, by keeping her off by additional lines." That is the only reference in the opinion to lines.

The Court: There is no dispute about who was doing the moving. In this case I suppose there will be a lot of argument about who was doing it, in

view of the fact that the lines came off the moored ship down to the moving tug.

Mr. Howard: Well, there is nothing in this case to indicate the lines didn't come off the ship either, your Honor, in the Chalmette case.

The Court: There is something in this case that somebody might argue was distinguishable in that the case says the moving of the moving vessel was being done on board the moving vessel, whereas in this one, as I understand it, the respondents contend that the moving was being not on the so-called moving vessel by any force being applied not on the moving vessel but by a force that was being applied under the control of the ship. However——

Mr. Howard: That may be their contention. We haven't heard the evidence on that yet.

The Court: No; that is right. Now if you [252] can find any more cases on this, I expect you have done a lot of searching, but if you can find any more cases I ask you to do it, because this is one of the points, one of the critical points in the case. Possibly there could be others arise later, but this seems to be one of them now.

Mr. Howard: I appreciate that, your Honor, and I'll undertake to find——

The Court: And I wish opposing Counsel would do everything he can to find cases on this subject, especially if they involve a line situation more like this than anything that I have been reminded of yet, namely, lines furnished by the moored ship and put onto and made fast to the so-called moving vessel, after which the accident happened. I wish

you to proceed now, though, with the taking of testimony.

Mr. Howard: May I resume the witness stand, your Honor?

The Court: You may. You may resume the reading of the deposition if you are ready. I would like to have returned the Federal Reporter.

(The volume was returned to the Court.)

The Court: Page 46.

Mr. Biele: Your Honor, may I suggest we go back to 45 and take up the question there? [253]

The Court: Any objection, Mr. Howard?

Mr. Howard: No objection.

The Court: You may do that.

Mr. Biele: This will be the last question on 45.

(The reading of the deposition of Otto K. Boltz was continued as follows:)

DEPOSITION OF OTTO K. BOLTZ

“Q. What I would like you to do, Chief, is to point out any entry in Exhibit 6 showing that any engineer logged that that light was out prior to the accident?

“Mr. Gerity: The light was out?

“Mr. Hanrahan: The light was in position.

“A. That is something I don't know, because it is little things, you know, because the light—I don't write this logbook, that is not the engineer supposed to write. It must be in the deck log for sure because that is the people that put the bar

(Deposition of Otto K. Boltz.)

over. (Indicating in logbook.) Here is where Pilar signed in that section there, that the light was over the stern—that is the 4 to 8 section.”

The Court: Wait a minute. I saw “Pilar” a minute ago but I do not see “Pilar” now. Where is that?

Mr. Howard: The fourth line from the top, “Pilar.” [254]

The Court: “Here is where Pilar signed in that section there.” You may proceed.

(The reading was continued as follows:)

“Q. And what time was that entry made?

“A. It is right after finished with engine.”

The Court: It does not state the time, is that it, Counsel on both sides?

Mr. Howard: It may have appeared earlier in the deposition. I don’t recall, your Honor.

The Court: It is all right, then. We will not interrupt the reading. Proceed.

(The reading was continued as follows:)

“Q. I would like to get back once again to the entry which you made starting with the words ‘Propeller warning’—that is in your own handwriting? A. Naturally.

“Q. The point I am trying to make is, and I think you will agree if you understand the question, you had no personal knowledge that the propeller warning lights were in place?

(Deposition of Otto K. Boltz.)

“A. No; I never have to go even to look at them because it is not my business.

“Q. So that is just based on an assumption?

“A. That is right, but I mean I wish to point out that I absolutely have nothing to do with the warning lights, [255] taking them in or putting them out, because that strictly comes in the deck department.

“Q. I understand that, but what I am trying to bring out is that in this entry many of the things in here are things which I do not think you have personal knowledge of, isn't that so?

“A. Well, I just put it down because, like I say, we log it every watch because it is already logged here on this section, consequently I put it in. It says on the 4 to 8 watch that the warning light is in place, and signed by the engineer on watch in the log.

“Q. I am talking about before the accident.

“A. Well, then, we were in docking process. Then there is nothing out—you have nothing out when you are docking.

“Q. Will you look at that entry again and tell me which part of that entry which I am pointing to that you made in your own handwriting?

“A. All of it.

“Q. How much of that do you have personal knowledge of?

“A. Well, of everything, all the inspections were made by me and the other gentlemen included.

(Deposition of Otto K. Boltz.)

“Q. Will you read the first sentence again?

“A. (Reading): ‘Propeller warning light and sign in place.’

“Q. You have no personal knowledge whether that is so or not? [256]

“A. No; I wasn’t there when they put it over, that’s right.

“Q. Now, take the next sentence.

“A. (Reading): ‘At 1845 barge E-15 broke propeller and rudder while being pushed by tug Lea Moe.’

“Q. You have no personal knowledge of that either, have you? A. No.

“Q. Now read the next sentence.

“A. (Reading): ‘To spot barge at No. 25 at No. 5 hatch.’

“Q. You have no personal knowledge of that either, do you? A. No.

“Q. Now take the next sentence.

“A. (Reading): ‘Witnessed by chief mate.’

“Q. You put that in because he told you he saw it?

“A. Because he took the time, that is correct.

“Q. You did not see it?

“A. No; I am not a deck man.

“Q. Read the next sentence.

“A. (Reading): ‘Immediate inspection was made by master, chief mate and chief engineer.’

“Q. You do have knowledge of that?

“A. Definitely.

“Q. Is that the end of it?

(Deposition of Otto K. Boltz.)

“A. Then comes the propeller inspection after that, and then it was when the Coast Guard came down that evening. [257]

“Q. And you have personal knowledge of that?

“A. Oh, yes; we actually got a boat and went out.

“Q. Now, on a ship such as the Cotton State when you get the signal ‘Finished with engine,’ what do you have to do before you start the jacking engine?

“A. Close off the main stops and open up your throttle drain to release the pressure in the running.

“Q. During that process does steam ever get to the turbine so as to turn the propeller somewhat?

“A. Oh, no, it can’t; there are double stop valves, the main boiler stop and the bulkhead stops.

“Q. Now, it is your testimony that the propeller turns a full revolution on the jacking gear in seven to eight minutes? A. That’s correct.

“Q. Then is it true that in order for three blades of the propeller to be damaged it would be necessary for the propeller to turn at least half a turn? A. Oh, it will have to, yes.

“Q. And that would be between three and a quarter and four minutes?

“A. That should be that way.

“Q. It would be at least that, wouldn’t it?

“A. Well, it should be.

“Q. If you got a telephone call from the deck

(Deposition of Otto K. Boltz.)

department [258] that told you that something was fouling the propeller or apt to foul the propeller, how long does it take to stop the jacking gear?

“A. Oh, a few seconds to run down and push the button.

“Q. If you were standing right at it you would just have to push a button?

“A. No; you got to climb over a casing because the jacking gear is on top of the turbine, the reduction gear housing.

“Q. When you get to it, what do you do—just push a button?

“A. Yes; push a button that opens up the switch.

“Q. And then the propeller stops immediately?

“A. The jacking gear stops as soon as you push the button to stop the motor.

“Q. Now, at the time you got the finished with engine and you left the engine room, you knew nothing about any possibility of scows coming alongside? A. Oh, no, how would I?

“Q. You would not unless someone on deck told you? A. That is correct.

“Q. And no one on deck did say anything to you? A. No.

“Q. Is there a telephone communication between the engine room and deck department?

“A. Yes. [259]

“Q. Is there a telephone on the bridge?

“A. Yes.

(Deposition of Otto K. Boltz.)

“Q. And is there a telephone at the stern of the ship? A. Yes.

“Q. And were these telephones in proper operating condition on January 10, 1957?

“A. As far as I know.

“Q. And when you left the engine room at the time finished with engine was rung you gave no instructions to anyone because you thought they were not necessary, is that right?

“A. That's correct.

“Q. What was the fourth assistant engineer's name? A. Pilar.

“Q. How long had he been on the ship?

“A. Well, he just joined the ship; he was a new engineer.

“Q. When did he join the ship?

“A. I don't know.

“Q. Did he join at Seattle?

“A. He joined at Seattle, that's right, he was from Seattle, that is correct.

“Q. And he joined the ship there?

“A. That's correct?

“Q. What do you know about his qualifications as an engineer? [260]

“A. He is a licensed chief engineer.

“Q. Did you see his license?

“A. I certainly did; it had to be posted.

“Q. Do you remember what license he had?

“A. 3, 5—third issue of chief engineer.

“Q. And had you worked with him at all during the time he was on the vessel up to the time of

(Deposition of Otto K. Boltz.)

this accident? A. No.

“Q. So you had no personal knowledge of his qualifications, but you knew he had a license issued by the Coast Guard, is that right?

“A. That’s right.

“Q. Now, when you turn the propeller on the jacking gear, the real purpose of that is not to turn the propeller but to turn the turbine?

“A. You can’t turn the turbine without turning the propeller.

“Q. But the reason you do it is to turn the turbine, isn’t it?

“A. That is correct, to cool her.

“Q. On ships other than turbine driven ships it is not necessary to turn the propeller on a jacking gear ordinarily, is it?

“A. Not for cooling purposes—I will say it this way—I could go into a lengthy affair that way, but not for [261] cooling purposes you don’t have to turn.

“Q. Vessels other than turbine driven ships when they arrive at a dock and are mooring they ordinarily do not turn their propeller on the jacking gear, do they?

“A. I rather not answer that question. If I do I wish to take off the record. I can’t answer that question because I have nothing to do with other types of engines except turbines.

“Q. While the propeller is turning on a jacking gear, if the propeller was menaced by anything, in

(Deposition of Otto K. Boltz.)

the engine room you would have no way of knowing that unless the deck department reported it?

“A. Naturally.

“Q. And in that situation of menace you would expect the deck department to notify you?

“A. They notify us about everything. When they start the engine they have to notify us that everything is clear—they always do and it is——

“Q. After the engine started and the propeller was turning, if anything menaced the propeller at the time, you would expect the deck department to notify you, wouldn't you?

“A. They would, because the mate is on duty night and day.

“Q. And that is his duty, isn't it?

“A. That is his duty to see that everything is clear on the [262] vessel.

“Q. When you start turning the propeller on the jacking gear prior to leaving a port, you telephone to the deck department to make sure the propeller is clear?

“A. Sometimes telephone and sometimes the engineer goes to see the mate personally and asks him to have a look at the propeller to see that it is clear, he wishes to turn the propeller. Then as a rule the mate, whoever is on watch, phones down and lets the first assistant know, ‘Go ahead, everything is clear,’ and then there is an entry made in the logbook and bell book too, but always in the logbook, ‘Permission received from bridge to turn propeller.’

(Deposition of Otto K. Boltz.)

“Q. Why do you ask the deck department whether the propeller is clear when you are starting the jacking gear before leaving port?

“A. For the reason, due to loading operations, especially in foreign ports, you have all kinds of barges and boats around and so forth—that is why we have to ask them.

“Q. And if there are barges or something else in the way of the propeller and you start the propeller on the jacking gear, it is reasonable to expect that the propeller will be damaged, isn't it?

“A. Any time a propeller strikes a heavy object you can [263] expect damage.

“Q. And that is true even when it is turning on the jacking gear? A. Certainly.

“Q. Is it improper for a vessel such as the Cotton State not to have a licensed engineer in the engine room at all times?

“A. Yes; it is improper.

“Q. What hours did the fourth assistant engineer work on January 10, 1957?

“A. Well, I have to refer to the logbook. I can't remember that. (Referring to logbook.) He was on until the next morning, until 8:00 a.m.

“Q. Starting when?

“A. From after finished working hours in port—that is from 5:00 o'clock.

“Q. From 5:00 o'clock to 8:00 a.m. he was on watch? A. That's right.

“Q. Wasn't he on prior to 5:00 p.m. that day?

“A. No; not as far as I recall.

(Deposition of Otto K. Boltz.)

“Q. Doesn’t the fourth assistant engineer do day work on the Cotton State?

“A. Every engineer does day work.

“Q. Can you tell me either by looking at your log or otherwise whether or not it is a fact that the fourth [264] assistant had come on duty on the morning of January 10, 1957?

“A. In the morning? No; I can’t recall that. I don’t think it is in the logbook either.

“Q. Will you look at the log and see?

“A. (Referring to log): He was not on what you call active watch—but a C-2, due to the nature of the plant, besides the night engineer to avoid any trouble or the plant kicking out, the company always has also on a C-2 kept one of the ship’s engineers on board on security watch. If you look in the logbook you will see it says night security. He is not a watch engineer. Mr. Kane and Mr.—can I see the smooth log? (Referring to Libelant’s Exhibit 7.) Mr. Kane and Mr. Provost were the regular night engineers on duty. Mr. Pilar was night security engineer staying on board in his quarters in case he was needed by the night engineer.

“Q. Now, starting at midnight on January 9th what hours did Mr. Pilar work?

“A. Well, that day he worked, like I say, he assisted me in shifting ship with Mr. Greene.

“Q. No; I am going back a day now—January 9th at midnight, or 12:01 a.m. on the 10th.

“A. On the 10th Mr. Pilar was not working,

(Deposition of Otto K. Boltz.)

it was Mr. Greene was night security [265] engineer.

“Q. When did Mr. Pilar first go to work on the 10th?

“A. Well, he probably worked during the day.

“Q. What time did he start?

“A. 8:00 o'clock the work starts in the morning in the engine room. I am not positive if he worked, but I presume, because as a rule all the day engineers turn to at 8:00 a.m. if the ship has a night engineer in port.

Q. If your assumption is correct, starting at 8:00 a.m., did he work then to 5:00 p.m. on day work?

“A. He worked longer because he assisted me in shifting the ship on the 10th.

“Q. Then he worked from 8:00 a.m. until the time finished with engines was rung at Everett, Washington?

“A. Yes; then secure and everything—it isn't finished with engine that everyone comes out of the engine room, you know.

“Q. And after that he was night security engineer, is that right?

“A. That's right, that means he remained on board in case the night engineer needs him.

“Q. And that would be until 8:00 o'clock the next morning? A. Right.

“Q. Who was the watch engineer at the time of the accident? A. Mr. Kane. [266]

“Q. Referring to Exhibit 8, what time was

(Deposition of Otto K. Boltz.)

finished with engines at Everett on January 10th?

“A. (Referring to log): 1835.

“Q. How do you start the jacking gear? Is it just a question of pressing a button again?

“A. No; you got to engage it.

“Q. How do you do that?

“A. You got an engaging gear in the back of the high speed pinion shaft. By doing so you have to lift up on a catch, which is a safety device, and also take off the top plate on the jacking gear and take this out and reverse it, turn it over. There is a horn projection on this plate which keeps the jacking gear from being engaged while the turbine is turned by steam, so this plate has to be taken out, and the horn faces upward. Then the jacking gear can be engaged by turning the wheel until the two clutches come together.

“Q. How long does that take?

“A. Takes about a minute.

“Q. And how long after you receive the finished with engine order is it before you can start using the jacking engine?

“A. A couple of minutes at the most—the wheels are right close to the main engine, the steam stops are located close to the main engine. [267]

“Mr. Gerity: Steam stop valves, you mean?

“The Witness: Yes, steam stop valves are located close to the main engine.

“Q. I think I have asked this before, but before you start the jacking gear no one from the engine

(Deposition of Otto K. Boltz.)

room comes up to look at the propeller, you rely on the deck department?

“A. Sure, because there is a licensed deck officer in the vicinity of the stern to notify us in case there is any obstruction in the vicinity of the propeller.

“Q. And you depend on him?

“A. I certainly do. He is a qualified man.

“Q. Referring to Exhibit 7, in whose writing is this?

“A. That is my writing—all of it.

“Q. And is this a copy?

“A. That is a copy of the rough log and that goes for references.

“Q. So if there are any entries in the rough log, Exhibit 6, which are assumptions, those same assumptions will be carried into the smooth log?”

Mr. Howard: That question was not answered.

The Court: You see, that is the vice of one making a statement without putting words in it that denote that you are asking a question instead of merely throwing out an explanation. Go on to the next question. [268]

“Q. If there are any assumptions in the rough log, those assumptions, if any, are carried to the smooth log?

“A. That is not as a rule assumptions because I am going to see the deck officer on watch to get the correct times when incidents occur. I am supposed to log those the same as they do.

“Q. But generally speaking you carry over into

(Deposition of Otto K. Boltz.)

the smooth log what you previously put in the rough log? A. That's correct.

“Q. Where is this entry I am pointing to in the rough log found in the smooth log? I am pointing to the entry starting ‘Propeller warning.’

“Mr. Gerity: There is a slew of those entries. It is written vertically along the edge of the page that counsel is referring to?

“Mr. Hanrahan: That is correct.

“A. The rough log is the official.

“Q. I don't see it entered.

“A. No, it doesn't have to be in there because this is the official log—but all the inspections are in there.”

The Court: Court will be at recess for about ten minutes.

(Short recess.)

The Court: You may resume the reading of the deposition. [269]

(The reading of the deposition of Otto K. Boltz was continued as follows:)

“Q. So the entry that Mr. Gerity just found in the smooth log”——

The Court: Just as a reminder state the number of the page, please.

Mr. Biele: The top of Page 61, your Honor.

The Court: You may proceed.

(The reading continued as follows:)

(Deposition of Otto K. Boltz.)

“Q. So the entry that Mr. Gerity just found in the smooth log is a copy of the entry in the margin of the rough log, the page in the rough log dated January 10-11, 1957?

“A. That’s correct. We have to keep the smooth log.

“Mr. Hanrahan: That is all I have.

“Redirect Examination

“By Mr. Gerity:

“Q. Chief, in the dating of the engine room log-books the times are kept from one noon until the next noon?

“A. From noon to noon.

“Q. As distinguished from the deck log which is kept from midnight to midnight?

“A. That’s right.

“Q. At the time of this incident when the jacking gear stopped, as reported to you by Engineer Kane, was [270] Engineer Kane on duty in the engine room? A. Yes, sir.

“Q. You talked about putting over warning signs for the propeller. You have described for us a warning board which is 5 feet long and 3 feet wide with red lettering ‘Keep clear of propeller.’ Is or is not that a permanent fixture over the side of the rail?

“A. That is a permanent fixture over the side of the rail.

“Q. Bolted in place? A. That’s right.

(Deposition of Otto K. Boltz.)

“Mr. Hanrahan: Would you identify that better?

“Mr. Gerity: I can’t identify it better. I said a board 5 feet by 3 feet with red lettering ‘Keep clear of propeller.’

“Q. When your jacking gear is in reverse motion how does the propeller turn, counterclockwise or clockwise? A. Either way.

“Q. But when the propeller is turning astern?

“A. It turns counterclockwise.

“Q. And when it is turning ahead?

“A. It turns to the right.

“Q. You say that Mr. McLaughlin was aft when the vessel moored?

“A. That’s right. [271]

“Q. Are you absolutely certain of that of your own knowledge?

“A. I didn’t see him, but he told me ‘I seen a barge come into the propeller.’

“Q. But you did not know if he was aft at the time of tying up? A. No, but he told me so.

“Q. That is your recollection? A. Yes.

“Q. The watch officer is not on the stern when the Cotton State docks after the mooring lines are secured and the warnings are put over—there isn’t a watch officer standing there all the time, is there?

“A. No, but he makes a round of the decks.

“Q. Now, with respect to the warning signs being in place, counsel has pointed out to you that they are only in place—with respect to your entry of

(Deposition of Otto K. Boltz.)

the 10th, starting in the margin of Exhibit 6, 'Propeller warning lights and signs in place'—I ask you to inspect your log book, if you will, and tell me how many entries starting on page 1, you have similar entries under date of January 6th.

“(Discussion off the record.)

“Mr. Gerity: You can put it this way. The log-books are the best evidence. Counsel will not [272] disagree with me that at the end of every watch similar entries are made of the warning signs in place, that is a regular routine?

“Mr. Hanrahan: I will agree that there seems to be a regular routine to put such an entry in the logbook.

“Q. When you receive reports of incidents on deck, Mr. Boltz, are they made to you in the regular course of business in your capacity as chief engineer?

“A. Well, not exactly, I mean what happens on deck.

“Q. If it is necessary to advise you, are they made to you in your capacity as chief engineer?

“A. Yes, especially in this case because it concerned the propeller, you see.

“Q. When you made the entry in Exhibit 6 after the accident, timed at 1845, with respect to the warning lights, were those warning lights that you have described to us when you went on the dock and saw the port side and saw the starboard

(Deposition of Otto K. Boltz.)

side where they were damaged—were they of your own personal knowledge?

“A. That’s right, that was when I went with the captain and the mate on the dock.

“Q. You have also told us when you went up on deck you saw this barge off your starboard quarter, and lumber was floating around on the water? [273]

“A. Yes.

“Q. Was the lumber also in the area of the propeller?

“A. Yes, it was drifting all over the whole area.

“Q. Is it not a fact that there is a light which shows up when the jacking gear is in motion, which is visible to an engineer?

“A. Yes, on the engine alarm panel.

“Q. And that light will continue to burn as long as the jacking gear is turning?

“A. That’s correct.

“Mr. Gerity: That is all I have.

“Recross-Examination

“By Mr. Hanrahan:

“Q. Where were you when you first saw Mr. Kane on the night of January 10, 1957?

“A. When the accident happened?

“A. No, where were you when Mr. Kane and you first spoke to each other on the night of January 10th?

“A. I was right outside my door close to the engine room door.

(Deposition of Otto K. Boltz.)

“Q. You were standing in the companionway?

“A. In the companionway, yes.

“Q. And is that the time he came to you and told you that the jacking engine was not turning over?

“A. That the jacking engine had stopped—if you are [274] referring to this accident.

“Q. That is referring to this accident. Was that the first time you had seen him that night?

“A. That’s right.

“Q. Do you know what time that was?

“A. That was just prior to the accident.

“Q. Well, you don’t know when the accident occurred, do you?

“A. I don’t know the right time when the accident occurred. Like I said, if I don’t know the times I get it from the deck because I always like to make an entry for my own satisfaction.

“Q. Just one more: At the time you had that conversation with Mr. Kane you did not know whether the accident had happened or not at that time? A. I didn’t know nothing.”

Mr. Howard: The libelant offers that deposition.

The Court: This deposition is received in evidence as a part of the libelant’s case in chief with like effect as if the witness were personally present, were sworn and testified from the witness chair. Next?

Mr. Howard: I would like to offer the testimony of Mr. Kane by deposition.

The Court: Kane, K-a-n-e, Mr. Howard? Was [275] that the name?

Mr. Biele: Your Honor, with your Honor's permission may Mr. Crutcher read the questions?

The Court: He may do so, and may I suggest that you speed up the reading, and any time that either becomes tired physically, do not hesitate to let someone else spell you off. Admiralty cases commonly have a large percentage of the proof in the form of depositions and we have to read them, and I find that those who have a special knack at speeding up the reading do, it seems to me, a great service to both sides, their own side and the other side and the Court, all. You may proceed.

Mr. Crutcher: Thank you, your Honor. I will start on Page 3 with the direct examination by Mr. Howard.

The Court: Mr. Howard, do you have a copy of this deposition?

Mr. Howard: Yes, I have my copy.

The Court: Proceed.

Mr. Crutcher: Page 3, Line 3.

(Thereupon, the deposition of Thomas F. Kane was read as follows:)

DEPOSITION OF THOMAS F. KANE

“Q. Will you state your full name, Mr. Kane?”

The Court: Now wait a moment. Has the [276] libellant rested, or what do you mean?

Mr. Crutcher: I beg your pardon, your Honor,

(Deposition of Thomas F. Kane.)

this is offered by Mr. Howard and Mr. Howard will read the answers as before, is that right?

Mr. Howard: That's agreeable with me, your Honor.

The Court: Proceed.

(The reading was continued as follows:)

“Q. Will you state your full name, Mr. Kane?

“A. Thomas F. Kane.

“Q. What is your age, sir?

“A. Sixty-seven.

“Q. Where do you reside?

“A. 2565 Magnolia Boulevard, Seattle.

“Q. Do you hold any licenses issued by the United States Coast Guard?

“A. Yes, I do; Chief Engineer Steam and Chief Engineer Diesel, Unlimited Horsepower, Any Tonnage.

“Q. What issue on that license do you recall?

“A. Oh—— (pause)

“Q. When did you first get it, the Chief Engineer's License?

“A. The Chief Engineer's License?

“Q. The Chief Engineer's License.

“A. 1915.

“Q. Prior to that did you have your license as an assistant? [277]

“A. As an assistant, yes.

“Q. What is your present employment?

“A. Relief engineer.

(Deposition of Thomas F. Kane.)

“Q. How long have you been working as a relief engineer?

“A. Since September, 1956.

“Q. Prior to that time, what was your employment?

“A. Chief engineer of an M.S.T.S. vessel.

“Q. What vessel? A. The Kern.

“Q. How long were you chief engineer on that vessel?

“A. Just a brief period; ten days.

“Q. Prior to that, what was your employment?

“A. Superintendent of construction for the Fraser Boiler Company in connection with the construction of a power plant at the Whidby Island Naval Air Station.

“Q. For how long did you hold that position?

“A. Fifteen months.

“Q. That would have been during what months? A. 1954 and 1955.

“Q. Prior to that, what was your employment?

“A. United States Inspector of Vessels, Coast Guard.

“Q. Did you hold a commission in the United States Coast Guard? A. Yes, sir, I did.

“Q. What was your rank, the highest rank you attained? [278]

“A. Full Commander.

“Q. What was the date of your retirement?

“A. June 1, 1952.

“Q. How many years did you serve as a commissioned officer in the United States Coast Guard?

(Deposition of Thomas F. Kane.)

“A. Ten years.

“Q. And during that period what type of work were you engaged in?

“A. Ship inspection, ship construction, boiler construction, dry dock inspection, inspection of machinery, installation for the United States Army in the Ninth and Eighth Service Commands.

“Q. Did that work involve inspections particularly as to engineering equipment on the Merchant Marine vessels? A. Most of it.

“Q. Most of it. Have you been regularly employed by the States Marine Lines at any time?

“A. No, never.

“Q. Have you been regularly employed by any other steamship company? A. Recently?

“Q. Since your retirement from the Coast Guard.

“A. No, not outside of the M.S.T.S.

“Q. Just the M.S.T.S., and that is a branch of the United States Army? [279]

“A. That is right.

“Q. How do you now obtain your assignments to serve as a night engineer?

“A. Through the Marine Engineers' Beneficial Association.

“Q. Is that a system of dispatching?

“A. That is right.

“Q. Does it involve boarding of vessels as a night engineer in rotation with other engineers?

“A. Yes, it does.

“Q. Mr. Kane, do you recall having served as

(Deposition of Thomas F. Kane.)

night engineer on the Cotton State in January of 1957? A. Yes, I do.

“Q. Will you state how many shifts or how many nights you served on that vessel?

“A. I believe four nights.

“Q. Where was the vessel at the time that you were putting in these shifts as night engineer?

“A. The first night was down here at Pier 37. I believe it was Pier 37. The next night was at Everett, and I believe after that it was at Todd's Dry Dock Company at Seattle.

“Q. At Seattle? A. Yes.

“Q. And what hours did you work as a night engineer on the Cotton State? [280]

“A. From 4:00 p.m. to 12:00 midnight.

“Q. What type of vessel is the Cotton State?

“A. A general cargo vessel.

“Q. What type of propulsion machinery does she have? A. Steam turbines.

“Q. Calling your attention particularly to the night that you said you worked aboard the vessel at Everett, Washington, did you proceed from Seattle to Everett aboard the vessel?

“A. No, I drove from Seattle to Everett.

“Q. Where in Everett did you join the vessel?

“A. Port Dock No. 1, I believe is the name of the dock.

“Q. What time did you arrive at Port Dock No. 1 approximately? A. Oh, about 6:20.

“Q. With a twenty-four hour clock, that would be about 1820 hours? A. 1820 hours.

(Deposition of Thomas F. Kane.)

“Q. Did you observe the Cotton State at that time, and if so, where was she located?

“A. She was approaching the dock apparently from Seattle.

“Q. What was the condition of the visibility at that time?

“A. It was dark. The vessel's proper lights were burning.

“Q. As the vessel approached the dock and the lines were secured to the dock what, if anything, did you do during [281] that period?

“A. I walked aft along the dock. The vessel was port side to the dock. I walked along the dock to observe the condition of the blinker lamp and the warning sign under the port counter.

“Q. What prompted you to do that?

“A. It is a part of my routine duty.

“Q. Prior to or at the time you commenced your service on the Cotton State did you receive any instructions regarding the use and observation of the use of the propeller warning boards and flashing lights? A. On the vessel?

“Q. On the vessel. A. Yes, I did.

“Q. From whom did you receive them?

“A. The chief engineer.

“Q. When did you receive those instructions?

“A. When I first boarded the vessel at Seattle.

“Q. That would have been on the night previous to your service aboard the vessel at Everett?

“A. The 9th of January.

(Deposition of Thomas F. Kane.)

“Q. What instructions did you get from the chief engineer at that time?

“A. I was asked if I was familiar with the importance of the warning signs and the blinker lamps, and I said I [282] was familiar with the requirements, and I was instructed to make an entry in the logbook as to the condition of those elements each watch.

“Q. When you say ‘elements,’ you refer to what?

“A. The warning signs and the blinker lamps.

“Q. Going back now to the time when you said that you were on the dock, Port Dock No. 1 at Everett, will you state when your observation was made with respect to the port warning board and flashing lamp with reference to the time that the vessel arrived alongside the dock?

“A. It was dark, and I waited until the vessel was properly up against the dock. The vessel was just about secured when I made certain that the warning signs and the blinker lamp were in place and in operating condition.

“Q. Where were you on the dock when you made that observation?

“A. About abreast of those elements.

“Q. Was the gangway lowered and in place at that time? A. Not quite.

“Q. Could you observe from that position on the dock whether the starboard warning board and the flashing light was in place and lighted?

“A. No.

(Deposition of Thomas F. Kane.)

“Q. After you made this observation as to the port warning board and flashing light, what did you do next? [283]

“A. I went aboard the vessel at 1835, when the gangway was down.

“Q. And where did you go?

“A. To the chief engineer's cabin.

“Q. And where is that located?

“A. On the port side at midship.

“Q. Did you find the chief engineer in his quarters? A. No, I didn't.

“Q. What did you do next?

“A. I walked aft on the starboard side and observed the condition of the warning sign and of the blinker lamp in that area.

“Q. Referring to which side of the ship?

“A. The starboard side.

“Q. And from what point on the ship did you undertake to observe the condition of the starboard warning board and flashing light?

“A. On the poop of the main deck.

“Q. And how did you make that observation?

“A. By leaning over the bulwark and looking down.

“Q. How long was that after you boarded the vessel at 1835 hours?

“A. Perhaps three minutes.

“Q. What did you observe from that position as to the operation of the starboard warning board and flashing light?

(Deposition of Thomas F. Kane.)

“A. The warning sign was in place and it was visible, and the blinker lamp was in operation.

“Q. Now, will you describe for us what the warning board consisted of that you mentioned?

“A. It is a long narrow strip, I would say one by six, with black markings or a line alternating black and white for the length of the board.

“Q. What lettering, if any, is there on the board?

“A. I am not quite certain, but I think on that vessel it read, ‘Warning propeller turning.’

“Q. Will you describe the flashing light to which you have referred?

“A. Oh, it flashed about every ten seconds.

“Q. And the color? A. Red.

“Q. And where was the light located with reference to the warning board that you have described? A. Slightly above.

“Q. And where was the warning board located with reference to the poop deck, or deck level of the vessel at its stern?

“A. Perhaps six foot above sea level.

“Q. And how was it affixed in that place?

“A. The board was secured by a line forward and a line aft [285] brought up to the deck and secured to the deck railings.

“Q. Did you see anybody else on the stern of the vessel at the time you walked aft to make this observation?

“A. There were several crew members stowing

(Deposition of Thomas F. Kane.)

lines or engaged with their duties the same as I was. I paid no attention to them.

“Q. Where did you go after you had walked aft to this position to observe the starboard warning board and flashing light?

“A. When I was certain that the condition was in order, I proceeded to the chief engineer’s cabin.

“Q. Did you find him there?

“A. He was outside his cabin in the passage-way.

“Q. Did you remain in that area?

“A. I did for a brief time.

“Q. And where did you go then?

“A. Back in the engine room. I went to the engine room.

“Q. When you first went into the engine room did you meet any of the engineering officers of the ship? A. The second engineer, Mr. Green.

“Q. And where did you meet him?

“A. On the upper level.

“Q. Did you have any conversation with him at that time?

“A. I asked or we had the conventional conversation, and I asked him how the plant was going and other important [286] things, and he said he would be back in a few minutes, that he was going up either to take a sounding or he had some other duty on deck. So he went on his way and I went down below to make the inspection.

“Q. What was the inspection that you made when you went below?

(Deposition of Thomas F. Kane.)

“A. The general routine inspection to find out or ascertain the condition of the boilers and which ones were in operation, the condition of the machinery generally, the generators, the evaporators which were in use, pumps, turning engine, lubrication of the main engine, the bilges—just a general routine inspection.

“Q. When would this have been in point of time with reference to 1835 hours, when you said that you boarded the vessel?

“A. Oh, twelve minutes. That would be—forty-seven—1847.

“Q. Around 1847? A. 1847.

“Q. You mentioned the turning engine. What did you observe as to the operation of the turning engine when you made this check?

“A. The turning engine, which should have been in operation—it is a general practice that that unit should be in operation—was not in operation. [287]

“Q. What, if anything, did you do with respect to the operation of the turning engine at that time?

“A. I put on the switch to engage the unit but not the power because I didn't know whether the turning engine was supposed to be in operation with the management of that vessel. So that was about it. I just made certain that the turning engine was not operating.

“Q. What did you do then?

“A. After I had completed my work of inspection I appeared at the chief engineer's room to pay

(Deposition of Thomas F. Kane.)

my respects and ask as to the status of the turning engine.

“Q. What directions or advice did you receive from the chief engineer at that time?

“A. I hadn’t a chance to ask the question when the second engineer, Mr. Green, appeared to inform the chief engineer that there had been a collision of a barge and the propeller as he put it.

“Q. Was there anyone else present at the time other than you and the second engineer, Green, and the chief engineer? A. That is all.

“Q. While you were in the chief engineer’s room or the vicinity, did you receive any directions or instructions regarding further operation of the turning gear?

“A. I asked if the turning engine should not be in operation, [288] and he said, ‘Yes, by all means.’ So I replied that it was not in operation. So he said, ‘Will you get it going?’ So I went back to the engine room and attempted to start the unit, but it had an electrical failure condition. So I telephoned up to the chief engineer and advised him that the unit was not in working order and asked him if he would send the electrician down to get the unit going.

“Q. Was that done?

“A. It was done. The electrician and the second engineer appeared. You see with an electrical failure on those vessels——

“Q. (Interposing): I think I had better ask you a question.

(Deposition of Thomas F. Kane.)

“Mr. Biele: Just a minute here. Let him finish his answer.

“Mr. Howard: All right.

“A. (Resuming): In the case of an electrical failure, the company requires that the electrician be employed to correct the deficiency.

“Q. What causes the electrical failure of the turning gear?

“A. The safety element had, as we normally termed it, kicked out.

“Q. What causes that element to kick out?

“A. An overload. That is what the safety element is for, to take care of any overload on the unit. [289]

“Q. How long after your conversation with the chief engineer and the second engineer, Green, in the chief engineer's room when the accident involving the barge was reported did the electrician correct this electrical condition so that the turning gear could again be operated?

“A. Five minutes.

“Q. Thereafter, Mr. Kane, did you make any observation on deck or towards the stern of the vessel with respect to the presence and functioning of the warning boards and light?

“A. Yes. It is customary to make an hourly inspection of all mechanical equipment under the jurisdiction of the night or relief engineer, and I proceeded aft at 8:00 or 2000 and found that the starboard warning sign and starboard blinker lamp were not in proper condition.

(Deposition of Thomas F. Kane.)

“Q. What did you observe as to the condition of the starboard warning sign and light?

“A. The starboard warning sign was hanging by one rope. The line that held it was parted, and it was dangling by one end of the line, and the blinker light was damaged and not in working order.

“Q. Was it or was it not in the same condition as you had observed it when you first boarded the vessel and walked aft at 1835? [290]

“A. Pardon?

“Q. Was it or was it not in the same condition as when you first boarded the vessel and walked aft to observe the starboard warning board and light at 1835?

“A. It wasn't in the same condition as I had previously seen it.

“Q. What, if anything, did you do with respect to the correction of the condition of the starboard warning board and light that you observed at 2000 hours?

“A. I again reported to the chief engineer that the unit was not in working order and asked for the assistance of the electrician to get the lamp going first, and then I suggested that he might contact the deck department and get the warning sign tied up back in place.

“Q. Thereafter during the remainder of your watch that evening did you observe whether the starboard warning board and light were repaired and put back in operation?

(Deposition of Thomas F. Kane.)

“A. On my next round at 2100 hours—that is 9:00—I observed the warning sign was in proper place and the blinker had been repaired or renewed—I didn’t know which—and was in working order.

“Q. Calling your attention to a photostatic copy of a document which has been previously identified and offered in evidence as Respondent’s Exhibit 1, are you able to state what that is? [291]

“A. Yes, I made the entries.

“Q. What is it first? A. Pardon?

“Q. What is that document? Just describe it.

“A. It is an entry in the engine room log.

“Q. Is it a page out of the engine room log?

“A. That is it.

“Q. For what date?

“A. The 10th of January, 1957.

“Q. Does your signature appear on that page?

“A. Yes, it appears twice.

“Q. And in addition to your signature, did you make any entries on that page?

“A. Yes, I did.

“Q. Can you identify those by the hour line on which the entries appear?

“A. Yes, I can.

“Q. On what hour?

“A. Well, at eight o’clock, at the end of one watch, my writing appears and my signature.

“Q. What is the nature of the writing then that appears on the eight o’clock line?

(Deposition of Thomas F. Kane.)

“A. General temperature readings, pressure readings and no remarks.

“Q. No remarks? [292]

“A. No remarks by me.

“Q. Then are there any other entries apart from your signature in your handwriting?

“A. None other than as I said—readings.

“Q. Sir? A. Just readings.

“Q. Is there an entry in your handwriting on the hour lines for nine and ten p.m.?

“A. Yes, there is.

“Q. What does that entry pertain to?

“A. The nine o'clock entry, ‘Both boilers in use. Make-up evaporator in use. Turning gear in use four hours. Red light and warning signs in place, under stern.’

“Q. And that entry was made by you?

“A. That entry was made by me.

“Q. At what time?

“A. At nine o'clock and ten o'clock.

“Q. Is there any other entry in your handwriting apart from your signature appearing on this Respondent's Exhibit No. 1?

“A. On the last watch there are recordings of temperatures and pressures on the twelve o'clock hour.

“Q. That is on the line for twelve o'clock?

“A. For twelve o'clock, yes.

“Q. Now, going back, Mr. Kane, to the time when you first [293] boarded the vessel from the dock and walked aft along the starboard side, did

(Deposition of Thomas F. Kane.)

you make any observations at that time regarding the presence of any tugs or barges in the vicinity?

“A. When I was walking forward I saw a tug with two laden barges in tow.

“Q. What was on the barges?

“A. Lumber.

“Q. You mentioned walking forward. Would this have been before or after you had made your observation with respect to the warning board and light on the starboard stern of the vessel?

“A. After.

“Q. Immediately after?

“A. Immediately after.

“Q. Now, where was this tug and the two laden barges which you mentioned?

“A. The tug and the first barge were close to the vessel, and the trailing barge or the second barge was off shore perhaps twenty feet.

“Q. When you mention the first barge, what do you mean?

“A. The barge immediately following the towboat or tug.

“Q. And where would that first barge have been at the time of this observation with respect to the starboard side of the ship? [294]

“A. Oh, in the area of No. 5 hatch. Do you know whether or not that vessel has five hatches?

“Q. I can't answer that question for you.

“A. I would say the last hatch from aft.

“Q. And in which direction was the tow then proceeding?

(Deposition of Thomas F. Kane.)

“A. Along the side forward toward the vessel’s bridge.

“Q. And how far off the starboard side of the ship was the tug at that time?

“A. Oh, perhaps four or five feet.

“Q. And how were the barges attached to the tug, if you observed that?

“A. I didn’t observe that. It was just a casual observation. I wasn’t concerned with the fastenings.

“Q. Did you observe how the forward and the trailing barge were secured to each other?

“A. No, I did not.

“Q. Did you observe whether there were any lines then extending between the tug or either of the barges and the Cotton State?

“A. I didn’t observe.

“Q. During the shift that you worked on the Cotton State on January 10th while the vessel was at Everett, did you have any occasion to check to determine how long it takes the shaft and wheel of that vessel to make one complete revolution while the turning gear is engaged? [295]

“A. Yes, I did.

“Q. When did you make such a check?

“A. Oh, perhaps nine o’clock—at 2100.

“Q. And how did you make the check?

“A. By putting a chalk mark on the stationary element immediately adjacent to the shaft and a corresponding mark on the shaft and timing the revolution of the shaft.

“Q. Until the chalk mark revolved and came

(Deposition of Thomas F. Kane.)

back up to the same point? A. That is it.

“Q. And what did you determine the time to be for the shaft to make one complete revolution?

“A. I believe it was seven minutes and some second.

“(Witness refers to document previously designated Respondent’s Exhibit 1.)

“Mr. Biele: Let the record show that Mr. Kane is referring to some document which has not been identified yet.

“The Witness: Pardon?

“Q. Can you make an estimate of the time required for one complete revolution without referring to any document?

“A. Yes, seven minutes and thirty-five seconds, I believe, was the time.

“Q. And that is an estimate that you make without referring to any document? [296]

“A. That is right.

“Q. Do all merchant vessels, steam powered merchant vessels, have a turning gear mechanism such as found on the Cotton State?

“A. All vessels of proper size do have.

“Q. Would that refer to both reciprocating engines and turbines? A. That is right.

“Q. What is the purpose of the turning gear?

“A. Oh, it serves several purposes: for general overhauling of the main engines, propeller and shafting, but it is customary and more or less essential that the turning gear be engaged when the

(Deposition of Thomas F. Kane.)

vessel's engines are secured, and the turning engine does operate the main engine. Also for the purpose of controlling temperature conditions.

“Q. On a turbine driven ship such as you have described the Cotton State to be, what is accomplished by engaging the turning gear?

“A. The lubricating oil is used throughout the engine's working parts and the turning engine does operate the engine in order to control the expansion and contraction of the engine's metals.

“Q. From your experience in the Coast Guard and in service on vessels, will you state whether or not it is a [297] customary practice to engage the turning gear upon the arrival of a vessel at a dock and ringing up Finished with Engines?

“A. After the Finished with Engines the turning gear should be engaged and the engine kept in slow operating order.

“Q. How soon after a bell Finished with Engines is received in the engine room from the bridge would the turning gear normally be engaged?

“A. Oh, from two to five minutes.

“Q. With the type of turning engine or turning gear which was installed on the Cotton State, how long would you estimate that it would take to engage the turning gear after the engineer on watch undertook to do that operation?

“A. You refer to this vessel?

“Q. This vessel.

“A. Perhaps two and one-half or three minutes.

“Q. Was the turning gear such as was installed

(Deposition of Thomas F. Kane.)

on the Cotton State of a type of installation such as you have observed on other merchant vessels?

“A. It is a conventional type of installation.

“Q. Referring now to the warning boards and the flashing lights at the stern of the Cotton State, will you state whether or not that is a type of installation which you have observed and found on other merchant vessels? [298]

“A. It is similar.

“Q. When is the turning gear on a merchant vessel normally engaged with reference to the receipt of a Finished with Engines bell?

“A. Pardon?

“Q. When is the turning gear on a merchant vessel normally engaged with reference to the receipt of a Finished with Engines bell?

“A. Immediately after.

“Q. What did you observe as to the competency of the engine room personnel and staff on the Cotton State as a result of your service on that vessel for four night shifts in January, 1957?

“A. Satisfactory.

“Q. At any time during the period of your service on the vessel was there any failure or malfunction of the personnel in the engine room?

“A. At no time.

“Q. What, if anything, did you observe as to the operation and efficiency of the machinery and equipment of the Cotton State during the period of four night shifts that you worked on the vessel in January, 1957?

(Deposition of Thomas F. Kane.)

“A. The pertinent machinery was in satisfactory operating condition.”

Mr. Crutcher: The following, your Honor, [299] is cross-examination by Mr. Gantt, who represented the respondent and cross-libelant lumber company.

(The reading was continued as follows:)

“Q. Mr. Kane, when you first observed the tug and barge alongside the Cotton State on the night of January 10, I believe you stated that you made only a casual observation, is that correct?

“A. A casual observation of the tug and barges?

“Q. Yes.

“A. A casual observation.

“Q. Do you know whether at the time you observed the tug and two barges there was anyone on board either of the two barges?

“A. I don't recall having seen anyone on either barge.

“Q. Did you see or observe in any way the collision of either of these barges with the propeller of the Cotton State? A. No, I didn't.

“Q. You did not? A. I did not.

“Q. I believe you testified that you don't recall whether there were lines from the Cotton State to the two barges.

“A. I didn't observe any lines.

“Q. Do you recall how the lines were affixed between the tug and either of the two barges or both of them? [300]

“A. I didn't observe that condition.”

(Deposition of Thomas F. Kane.)

Mr. Crutcher: The following, your Honor, is cross-examination by Mr. Biele.

(The reading was continued as follows:)

“Q. Mr. Kane, you were not in the engine room at 1845, were you? A. Yes.

“Q. Was it not your testimony that you spoke to the second assistant engineer at 1845?

“A. That is right.

“Q. When you spoke to the second assistant engineer at 1847 where were you located in the engine room?

“A. I wasn't in the engine room; I was up in the passageway outside the chief engineer's room.

“Q. Is that when you first spoke to the second assistant engineer about the condition of the engine room?

“A. No, I had previously spoken to him.

“Q. When you first went into the engine room?

“A. When I first went into the engine room he was on his way out.

“Q. And where did you meet him?

“A. At the upper level on top.

“Q. Now, how many levels above the mechanism of the turning gear was that?

“A. Two levels. [301]

“Q. Was there any distance forward or aft on the vessel from the turning mechanism from where you were?

“A. From the turning mechanism going aft?

“Q. Yes, that is the question.

(Deposition of Thomas F. Kane.)

“A. About ten feet; immediately above and ten feet aft.

“Q. Were there any other licensed engineers in the engine room at the time you went in?

“A. No one that I had seen.

“Q. You didn't see any from the time you went in until the time you went up to the chief engineer's office? A. I don't get that question.

“Q. Did you see any other licensed engineer in the engine room from the time you went into the engine room until the time you went up to the chief engineer's office?

“A. No, I saw none other than myself.

“Q. You were alone in the engine room?

“A. I was alone in the engine room on watch.

“Q. Do you know whether the fourth engineer was on the vessel?

“A. His name is there some place (indicating Respondent's Exhibit 1 previously referred to). It is either Wyatt or Nyatt, or something like that. I never met him.

“Q. You never met the man?

“A. I never met the man.

“Q. When you spoke to the second assistant engineer did he [302] state to you anything about the condition of the machinery in the engine room?

“A. Casually. He was on his way out. He was in a hurry to do something else.

“Q. Did he state what he was in a hurry to do?

“A. I believe he said that he was going to take a fuel oil tanks sounding.

(Deposition of Thomas F. Kane.)

“Q. Did he say anything about the condition of the jacking gear? A. No.

“Mr. Howard: By ‘jacking gear’ you are referring to what we previously spoke of as the turning gear?

“Mr. Biele: That is correct.

“Q. You understand I am referring to the jacking gear as the turning gear.

“A. It is the same thing.

“Q. Did he tell you whether it was in operation or not?

“A. He didn’t say. It wasn’t discussed.”

Mr. Crutcher: Now, your Honor, at Page 32, Line 11, we now will eliminate down to——

The Court: Page 32?

Mr. Crutcher: Yes, your Honor, from Page 32 we now turn to Page 34.

The Court: Strange to say, 32 follows 33. [303] In other words, there is a displacement of Page 34. It should follow. That is all there is wrong. Now what is it you wish to eliminate?

Mr. Crutcher: We wish to commence on Page 34 at Line 10.

The Court: Line what?

Mr. Crutcher: Line 10.

The Court: I have it.

Mr. Howard: That’s agreeable.

The Court: You want to skip down to that point?

Mr. Crutcher: That is correct, your Honor.

The Court: You may do that.

(Deposition of Thomas F. Kane.)

Mr. Crutcher: Thank you.

(The reading was continued as follows:)

“Q. Mr. Kane, in your experience in the Coast Guard and Merchant Marine, have you observed the practice of checking the clearance conditions at the stern of a vessel before starting up the jacking gear? A. Yes.

“Q. Do you know whether that was done on this occasion or not?

“A. Before the jacking gear was engaged?

“Q. Yes. A. No. [304]

“Q. Such an inspection has a purpose, does it not, Mr. Kane? A. Yes, it has.

“Q. What is the purpose, if you know?

“A. The purpose is to make certain that the propeller is clear and no obstructions are present to cause damage to the propeller.”

Mr. Crutcher: Turning now, your Honor, from Page 35 to Page 36 where it is marked cross-examination resumed on Line 6.

Mr. Howard: That's agreeable.

(The reading was continued as follows:)

“Q. Mr. Kane, will you take a look at the log-book which Mr. Howard has produced and state if you recognize that book?”

The Court: Will you excuse me, Mr. Crutcher, I did not hear your last statement.

Mr. Crutcher: I beg your pardon, your Honor. We are now commencing on Page 36 at Line 6.

(Deposition of Thomas F. Kane.)

The Court: You may proceed.

Mr. Crutcher: And I'll repeat it.

(The reading was continued as follows:)

"Q. Mr. Kane, will you take a look at the log-book which Mr. Howard has produced and state if you recognize that book? [305] A. Yes, I do.

"Q. And is that the engineering log of the Cotton State? A. Yes, it is.

"Q. Do you find that you made any entries under date of January 10, 1957? A. I do.

"Q. Mr. Kane, did you make any entry on that particular page for January 10-11, 1957?

"A. Yes, I did, on two different watches.

"Q. Now, what watches did you make those entries on?

"A. The watch that began at four and ended at eight.

"Q. A.m or p.m.?

"A. P.m. on the 10th; and the watch that began at eight and was completed at midnight.

"Q. All right. Now, what entries did you make on the four to eight p.m. watch?

"A. Temperature entries only, and signed by me.

"Q. Now, the check marks are not yours?"

Mr. Crutcher: Oh, I beg your pardon, your Honor. Our own is mixed up at this point. The pages are reversed here.

The Court: Counsel ought to be careful in the future to see that everything is in order. It is

(Deposition of Thomas F. Kane.)

just a clerical mixup for which no one is responsible but for which all connected with the matter should have [306] taken a little more interest. You may proceed.

Mr. Crutcher: Commencing again at the top of Page 37.

(The reading was continued as follows:)

“Q. Specifically, what temperature entries did you make on that watch—and I am referring now to the four to eight p.m. watch?

“A. What temperature entries did I make?

“Q. Yes.

“A. The required temperatures. The numbers are in here.

“Q. Now, would you state for the record which of those temperatures you entered in the log?

“A. Well, the temperatures and also the boiler pressure.

“Q. All right. What entry of boiler pressure did you make? A. Boiler, 450 pounds.

“Q. At what time? A. 8:00 p.m.

“Q. Now, did you make any other entries?

“A. The entry showing the vacuum.

“Q. And what entry did you make regarding that? A. 25.5 inches.

“Q. Did you make any other entries?

“A. The temperature of the sea.

“Q. What was the sea temperature?

“A. 46. It looks like 46. Somebody has entered something [307] in this book.

(Deposition of Thomas F. Kane.)

“Q. Now, has there been an erasure on that book?

“A. No, not any erasure. It is just somebody who has been checking this off, apparently, with a check mark.

“Q. Now, the check marks are not yours?

“A. No, they are not. The temperature is 46. That was the prevailing sea temperature at that time.

“Q. Now, you are referring to the left-hand column under temperature readings?

“A. Yes.

“Q. From 8:00 o'clock on? A. Yes.

“Q. You say somebody put a check mark over the temperature reading that you put in there?

“A. Yes, and I believe it is in ink.

“Q. How did you make your mark? In pencil?

“A. In pencil. This is the rough log.

“Q. And when did you make your entry?

“A. At 8:00 p.m.

“Q. Now, referring to the entry immediately to the right of that, which is another temperature, the discharge temperature, at eight o'clock.

“A. That is 55 degrees.

“Q. And I note a check mark in respect to that. Did you make that check mark? [308]

“A. No, I didn't.

“Q. You just put in the 55 degrees?

“A. Yes.

“Mr. Howard: The Arabic 55?

“The Witness: Yes.

(Deposition of Thomas F. Kane.)

“Q. Now, the temperature to the right of that?

“A. That is the condensate. ‘Cond.’ is the way it appears in the logbook.

“Mr. Howard: At the top of the column?

“The Witness: Yes.

“Q. What temperature did you put in for the condensate?

“A. 85 degrees. These are all in Fahrenheit, by the way.

“Q. Now, there is a check mark below it. Did you make that? A. I did not.

“Q. Were those check marks on the last three temperatures that you stated on this log when you made the entries? A. No.

“Q. Now, continuing on across the page, Mr. Kane, did you make the temperature for DC heater?

“A. Yes.

“Q. You did make that? A. Yes.

“Q. And there is no check mark for that?

“A. None.

“Q. Now, were all these temperatures that you put in done [309] in pencil by you?

“A. No, they were not.

“Q. Some were in ink?

“A. Some in ink. This one, the DC heater temperature, appears in ink in my writing.

“Q. What were the others? I am looking at a photostatic copy, and not the original logbook. What were the others?

“A. The other boiler pressure is in ink.

“Q. What about the first three temperatures?

“A. The first four temperatures, that is, the sea,

(Deposition of Thomas F. Kane.)

the discharge, the condensate—pardon me. That first one was vacuum. You see, somebody has written across the top of this, and I have to refer to another page to find out what we are on here. The first was the vacuum and the next was the discharge and the next was the condensate—no, the vacuum, sea, discharge and condensate.

“Q. Did you make those in pen or pencil?

“A. Pencil.

“Q. In pencil.

“A. Those four were made in pencil.

“Q. Now, did you have any occasion to make any erasures when you made any of those?

“A. No. [310]

“Q. Did it appear when you wrote that that there had been previous erasures on that page when those entries were made? A. Pardon?

“Q. Did the surface of the paper appear to have been erased, or were those entries merely made in addition? A. Yes, it appears to be here.

“Q. Where do you see evidence of an erasure?

“A. Well, apparently, these recordings were made one column to the left.

“Q. Did you make them one column to the left?

“A. No, I didn't. I put them in their proper place.

“Q. What gives you the impression that they were put in one column to the left?

“A. It appears here to be an erasure.

“Q. Do you know whether any of the other assistant engineers or personnel of the ship made any erasures on that book?

(Deposition of Thomas F. Kane.)

“A. That I don’t know.

“Q. Was it ever discussed with you?

“A. It has not been discussed with me.

“Q. And these entries that appear here now were made by you, I take it, in places where they now appear?

“A. They were made where they now appear in their proper places by me.

“Q. By you? [311] A. By me.”

Mr. Crutcher: I will withdraw the question starting at Line 24 on Page 41 and go to Page——

Mr. Howard: Just a moment. I would like to check this.

The Court: You may do so.

Mr. Howard: To what page, Mr. Crutcher?

Mr. Crutcher: To Page 45, Line 15.

The Court: This is cross-examination, and the cross-examiner has a right to say whether he wishes to introduce it. The other Counsel has the right to ask that it be introduced and, if so, it will be done in connection with the other.

Mr. Howard: Line 15?

Mr. Crutcher: 15.

Mr. Howard: All right.

The Court: You may proceed, Mr. Crutcher, on Page 45, Line 15.

Mr. Crutcher: Yes, your Honor, thank you.

(The reading was continued as follows:)

“Q. Now, when you made those entries and signed the log, had the book been signed by the night security officer, M. Pilar?

(Deposition of Thomas F. Kane.)

“A. That I wouldn’t recall.

“Q. Do you recall any other watch with Mr. Pilar? [312] A. No, I don’t.

“Q. You do not know when he signed the book?

“A. No, he may have signed this book at any time he sees fit as long as it is signed before the end of the twenty-four period, which would have occurred at 12:00 noon on the eleventh.

“Q. Well, in any event, you don’t know when he signed it? A. No, I don’t.

“Q. When you went down into the engine room after first going to see the first engineer, did you see Mr. Pilar?

“A. If I did, I wouldn’t know it. I had never met the man. There were men coming in and going out of the engine room, and if Pilar had been one of those men, I wouldn’t have known it. I could have seen him but I didn’t know him. I wouldn’t recognize him.

“Q. You did meet the second assistant engineer?

“A. Oh, yes.

“Q. You recognized him?

“A. Oh, yes. You see, I had met him before. He and I were transacting business on a watch previous to that at Seattle.

“Q. Had you transacted any business with Mr. Pilar on previous watches?

“A. No, I had never met Mr. Pilar.

“Q. Now, Mr. Kane, when you went into the engine room you [313] encountered the second assistant engineer leaving the engine room, as I recall it?

(Deposition of Thomas F. Kane.)

“A. I met him as I was going into the engine room.

“Q. And he was on his way out in some sort of a hurry?

“A. No, he was in the engine room. He wasn't on the way out yet when I got there.

“Q. Now, you had some talk with him, did you?

“A. Yes, I did.

“Q. And I believe your prior testimony was that he was on his way to take a fuel oil sounding, or something, is that right?

“A. He wasn't out of the engine room yet, but he was intending to go out up on deck to take fuel oil soundings. I believe that is what he had in mind when I talked with him.

“Q. He was departing or about to depart?

“A. He was about to depart.

“Q. Now, as he left, I take it from your prior testimony, he didn't tell you the turning gear was or was not in operation? Nothing was said about it?

“A. Yes, as I recall, that wasn't discussed.

“Q. Now, this is off the subject here, Mr. Kane, but, as I understand, the turning gear is for the purpose of allowing the turbine blades to expand or contract uniformly. Is that the purpose [314] of it?

“A. That is one of the functions. It has other functions.

“Q. Well, that is the principal function?

“A. Not necessarily, no.

(Deposition of Thomas F. Kane.)

“Q. Now, you don’t have to use the jacking gear on a diesel engine when you shut it down, do you? A. Yes, that is done.

“Q. But it isn’t universally done? Some do and some do not?

“A. Some do and some do not.

“Q. It is not required by the mechanical functioning of the ship?

“A. It depends on what condition exists. If we are going to get the diesel engine under way, then we have to warm it up in advance, just like an automobile.

“Q. I am discussing the use of the turning gear or jacking gear when the ship comes into port and the plant is shut down. You don’t use the turning gear to turn the propeller over on a diesel-driven ship, do you?

“A. Yes, under certain conditions.

“Q. On all ships? A. Yes.

“Q. Do you do it on a Liberty ship or reciprocating engine ship?

“A. Not necessarily, no.

“Q. Would you do it on a ship that has a turbo-electric—one with an electric drive—that is driven by an [315] electric motor?

“A. Pardon?

“Q. Would you do it on a ship where the propeller is driven by an electric motor?

“A. Yes. You see, there are two—there is a divorced element there. The turbine is the unit to which the turning gear is attached.

(Deposition of Thomas F. Kane.)

“Q. On a turbo-electric ship?

“A. On a turbo-electric ship.

“Q. But if it is an electric motor that drives the propeller, when you engage the turning gear on a turbo-electric ship, you don't turn over the propeller, you turn over the turbine?

“A. That is it: the turbine and the generator on the turbine.

“Q. But not the propeller itself?

“A. Not the motor or the propeller.

“Q. That is one type of ship that you don't turn over the propeller after you land?

“A. After you make fast to the dock.

“Q. All right. You say after you make fast to the dock. You don't do it on a Liberty ship?

“A. No.

“Q. Now, Mr. Kane, to your knowledge, was there any means of communication between the engine room and the deck officers, and by that I mean was there a telephone [316] available to communicate with or a voice tube or bell system?

“A. Well, there is a telephone available.

“Q. If the deck officers had wished the turning gear disengaged and the propeller stopped, was there a means of rapid communication?

“A. He wouldn't say anything about or order it disengaged. He might request that the propeller be stopped from turning.

“Q. He might request that it be stopped?

“A. Yes.

(Deposition of Thomas F. Kane.)

“Q. And he had rapid means of communication, did he?

“A. Yes, there is communication all over the ship.

“Q. How would he communicate such a wish to a watch engineer such as yourself or anyone else that happened to be in the engine room?

“A. By ringing the telephone.

“Q. By calling on the phone?

“A. That is right.

“Q. Now, if he had made such a request that the turning of the propeller be stopped, how long would it take a watch engineer like yourself to accomplish that?

“A. To get to the telephone?

“Q. Well, upon receipt of an order to you to stop turning the propeller, how long thereafter would it take you to [317] accomplish or stop the turning of it?

“A. It would depend on what part of the engine room I would be in. If I was topside, perhaps it would take me half a minute. If I was down below at the log desk, which is adjacent——

“Q. How long would it take then?

“A. A quarter of a minute.

“Q. You can do it in half a minute from any place in the engine room?

“A. No, not from any place in the engine room. I would say a minute would be the maximum.

“Q. A minute would be the maximum?

“A. And you can do it in ten seconds if the

(Deposition of Thomas F. Kane.)

telephone rang, because the telephone is about eight feet from the log desk. What are you going to do? If we had an order to do something——

“Q. Just to stop the propeller—get ready to do it in the case of stopping the turning gear.

“A. I would say ten to sixty seconds.

“Q. Depending on where you happened to be?

“A. That is right.

“Q. And thereafter the propeller would be motionless? A. That is right.

“Q. Would you as an experienced officer, and having been in the Coast Guard, expect that the watch mate, seeing [318] something drift in on the propeller, would as a matter of prudence call up the engine room and tell the watch engineer to stop the propeller, that something is floating down on it?

“Mr. Howard: You are speaking of an engine room officer such as Mr. Kane?

“Mr. Biele: That is right.

“A. Well, this other chap of whom you speak would be who?

“Q. Well, one of the deck officers, or the watch officer on deck, sighting something adrift, something drifting in under the propeller or under the counter when the propeller is turning——

“Mr. Howard: You are asking this witness' opinion on that as an engineering officer?

“Mr. Biele: That is right.

“Q. Would you expect to be notified to shut off the propeller?

“A. Normally, no, because the propeller is oper-

(Deposition of Thomas F. Kane.)

ating with the turning engine, and we expect to continue to have it operating. But in the case of an emergency the deck officer might or could call up and ask to have it stopped.

“Q. If such an emergency were something imperiling the propeller or fouling the propeller, would that be a sufficient emergency?

“A. It depends on the object that was going to foul the [319] propeller.

“Q. Well, something of large size and dimension and weight that would damage the propeller members?

“A. It could be expected that the man might call up and ask to have the propeller stopped.”

The Court: I believe I will have to interrupt you here. Will it be convenient to Counsel to resume at 1:30?

Mr. Crutcher: Yes, your Honor.

Mr. Howard: That is agreeable, your Honor.

The Court: For those connected with this case the matter is continued until 1:30 and they may now be excused until that time.

(At 12:00 o'clock noon, a recess was taken until 1:30 o'clock p.m.)

November 28, 1958—2:15 p.m.

(All parties present as before.)

The Court: You may proceed in the case on trial. You may resume the reading of the deposition.

(Deposition of Thomas F. Kane.)

Mr. Howard: Your Honor, I have a supplemental [320] memorandum to submit, of which I have provided counsel a copy, on one of the questions your Honor asked us to look for additional authorities on.

The Court: When it is filed, Mr. Clerk, may I see it.

The Clerk: Yes, your Honor.

The Court: You may proceed with the reading of the deposition. I think we were on page 53, were we not?

Mr. Howard: Yes, your Honor.

Mr. Crutcher: Yes, your Honor, page 53, on line 3. This continues the cross-examination by Mr. Biele.

(The reading was continued as follows:)

“Q. And if such an action were taken, it is quite possible the damage to the propeller could be minimized or perhaps eliminated entirely?

“A. If the obstacle of which you speak drifted in and he did see that and did telephone or communicate and ask to have the propeller stopped, it could be minimized.

“Q. Mr. Kane, you have no idea, or do you know exactly when the propeller turning gear on the Cotton State was disengaged?

“A. Approximately, I would say——

“Q. Well, now, let me ask this: You didn't see it kick out, [321] did you?

“A. No, I didn't.

(Deposition of Thomas F. Kane.)

“Q. It was kicked out when you first saw it?

“A. That is right.

“Q. Have you any idea how long before that was kicked out, or are you just estimating from logbook entries or other means?

“A. I don’t know when the unit became disengaged.

“Q. And you have no knowledge when it was engaged except through——

“A. ——the entry in the logbook.”

Mr. Crutcher: And then, Your Honor, continuing on with page 54 at line 18.

“Q. Mr. Kane, have you gone over your previous testimony after it was typed up?

“A. Pardon?

“Q. Have you seen your previous testimony after it was typed up by Mr. Royse?

“A. No, I haven’t.

“Q. You haven’t read over what you previously testified? A. No.

“Q. When you went to the Chief Engineer’s room, Mr. Kane, and then returned to the engine room the second time—I am referring to now——

“A. (Interposing): I wonder if we can get that straight? [322] When I came aboard the ship at 1835 I went to the Chief Engineer’s room, but he wasn’t——

“Q. He wasn’t in his room?

“A. He wasn’t in his room or in that proximity. Then I went aft——

“Q. We got that.

(Deposition of Thomas F. Kane.)

“A. I know. That was three minutes. Then I came back again midships, and the Chief Engineer was there. That was the second visit I made to his room.

“Q. Then you went to the engine room?

“A. That is right.

“Q. And then went back again a third time to the Chief Engineer’s room?

“A. That is right.

“Q. And following the third visit to the Chief Engineer’s room you went below again to the engine room? A. Yes.

“Q. Now, when you went below, you attempted to start up the turning gear, is that correct?

“A. Yes.

“Q. When you made that attempt, did you determine whether the turning gear was clear of obstacles or obstructions?

“A. Well, we had that information. I was familiar with the condition existing, and that was that the barges were—or a barge had drifted in under the propeller. [323]

“Q. Now, my question was: Did you know whether the barges had been cleared from the propeller? A. No, I didn’t.

“Q. You started without determining whether they were there or not?

“A. Just a minute. The Chief Engineer was on deck, and he said, ‘Watch, wait until I see what is going on.’ And then he said to the Second Engineer, ‘Get the electrician and go down below.’ That is

(Deposition of Thomas F. Kane.)

his exact words. 'And when I give you the high sign, engage the turning engine.'

"Q. Hadn't you tried the turning engine and found it required an electrician?

"A. No, I didn't try the turning engine, but I tried the motor that would operate it or the electric current.

"Q. That is what I referred to.

"A. The electric current?

"Q. Yes.

"A. But the electric current there and throwing in the switch and using the rheostat doesn't start the unit. Throwing in the electric switch doesn't start the unit.

"Q. Is that what you tried after this third visit?

"A. No, I put in the electric switch. I tested the electric switch to see if there was any electricity there.

"Q. Was there electricity?

"A. No, apparently, on the line some place a fuse had kicked [324] out.

"Q. And this was following your visit on the third occasion to the Chief Engineer's quarters?

"A. That is right."

Mr. Crutcher: Now, your Honor, going on to page 59 with Mr. Howard's redirect—I beg your pardon. This is Mr. Howard's. Do you wish me to begin at the beginning?

Mr. Howard: I think you could start at line 3 on page 58, Mr. Crutcher.

(Deposition of Thomas F. Kane.)

(The reading was continued as follows:)

“Q. Are you familiar with how a night security engineer functions on States Marine Line vessels?

“A. Yes; it is customary for them to have a night security engineer aboard the vessel at no specified place for the purpose of consultation.

“Q. Who serves as a night security engineer?

“A. A licensed engineer appointed by the Chief Engineer.

“Q. One of the regular ship's engineers?

“A. Yes.

“Q. And how does the duty or responsibility of a night security engineer compare or contrast with that of a relief or night engineer such as you were serving as?

“A. His status is inactive. The night relief engineer's status is active. [325]

“Q. That is in the capacity that you were serving? A. That is right.

“Q. Compare that with a night security engineer?

“A. A night security engineer may remain in his room, and quite often in his berth or elsewhere, not necessarily in the engine room. He goes there for the purpose of consultation. That is a company requirement.

“Q. Is it customary on those vessels operated by States Marine Lines for the night security engineer to be present in the engine room during the night watch?

(Deposition of Thomas F. Kane.)

“A. According to the Cotton State, and that is the only vessel of that company with which I have been associated——

“Q. I don’t believe you understood the question. Is it customary for a night security engineer to be present in the engine room?

“Mr. Biele: You are referring to the Cotton State or the States Marine Line vessels generally?

“Mr. Howard: From this witness’ experience with the vessels of the States Marine Line.

“A. It is not necessary for a night security engineer to be in the engine room at any time during his watch.

“Q. Now, Mr. Kane, Mr. Biele asked you to give your opinion based on your years of experience in the Coast Guard and otherwise, as to what you might expect in the way of a request or an order from the watch officer on deck [326] with respect to some object that might be approaching or endangering the propeller.

“I want to ask you to assume that a barge in tow of a tug was coming alongside of a vessel moored at a dock at a time such as you found conditions to be aboard the Cotton State on the evening of January 10th, when you came aboard the vessel, with a propeller warning board and flashing red lights hanging from the stern of the vessel and the elements burning.

“Would you expect, under those circumstances, that a deck officer or watch officer on deck would

(Deposition of Thomas F. Kane.)

find it necessary to call the engine room and request that the turning gear be disengaged to stop the turning of the propeller?

“Mr. Biele: I will object to that because it does not have all the elements and facts that the States Marine Company is relying on in this case, and it has facts at the time of Mr. Kane’s observation on deck that are entirely different than those testified to by the Chief Officer of the Cotton State.”

The Court: The objection is overruled. Read the answer on line 21.

(The reading was continued as follows:)

“A. I would consider the warning signs and the flashing red lights sufficient to keep oncoming traffic away [327] from the propeller. That is the purpose of having the warning signs and the flashing lights installed in that area.

“Q. Would you then expect as an engineering officer and based on your experience in the Coast Guard and the Merchant Marine that a watch officer on deck would find it necessary to call by phone to the engine room to request that the turning gear be disengaged so as to stop the turning propeller?

“A. It could be possible, but not probable. We don’t ordinarily look for anything like that. There are times, of course—this is not relating to this case—there are times when a man may call down if he sees fit. For instance, if he is singling up the

(Deposition of Thomas F. Kane.)

lines of the ship, if one of the lines drops over the stern and the propeller is in action or motion, he would call down from the telephone, which would be on the poop, or the steering gear area, where these lines would be—he would call down and request that the propeller be stopped, that they were singling in the line, and he didn't want to foul up his line in the propeller.

“Q. Assuming there was no question as far as mooring lines or hawsers at the stern and that you had the situation of a small cable from a tug with barges in tow, such as you observed on the deck of the Cotton State before you [328] went below to the engine room and went up to the Chief Engineer's room and below, would you then expect the watch officer on deck to call and request the turning gear be disengaged?

“A. I would not expect that order.

“Q. Did you receive any such order?

“A. I didn't receive any such order.

“Mr. Howard: That is all.

“Recross-Examination

“By Mr. Biele:

“Q. When you observed the tug and barge in the position which you were just asked about in the last question, I gather that they were not in any danger of fouling or drifting down on the propeller, were they, as you observed them?

“A. Oh, I think I stated that the tug and the first barge were in the midship area.

(Deposition of Thomas F. Kane.)

“Q. And I believe you testified the second barge was——

“A. The trailing barge, I call it——

“Q. The trailing barge?

“A. The trailing barge was breasted off the vessel. That means it was away from the vessel.

“Q. It was away from the vessel's side at that time?

“A. Yes, about twenty-five to thirty feet. [329]

“Q. And when you gave your answer to Mr. Howard's last series of questions, was that the situation that you had in mind when you said you wouldn't expect an order to the engine room to stop the turning propeller?

“A. That would govern my thinking because of the fact that that barge was off of the vessel, breasted away from the vessel, and I wouldn't expect that barge to be under the propeller or under the counter.

“Q. Now, if you saw a tug pushing a barge directly onto the propeller, aiming right towards the propeller, would you expect the deck officer to call down and say to stop the engines?

“A. By all means.”

Mr. Howard: I offer that deposition in evidence, your Honor.

The Court: It is admitted as part of the libellant's case in chief with like effect as if the witness were here present personally and sworn and orally testifying from the witness stand. Call the next witness.

Mr. Howard: I would next like to read the deposition of Second Assistant Engineer Green.

The Court: You may do that. You may proceed.

(Thereupon, the deposition of J. J. Green was read as follows:) [330]

DEPOSITION OF J. J. GREEN

“Q. Mr. Green, you have been sworn by the court reporter? A. Yes.

“Q. Where do you live, sir?

“A. 1415 Sixth Street Northeast, Bellevue, Washington.

“Q. What licenses do you have in the——”

The Court: Pardon me just a moment. In what city, town or country was this deposition taken?

Mr. Howard: Vancouver, Washington, your Honor.

The Court: You may proceed.

(The reading was continued as follows:)

“Q. What licenses do you have in the United States Coast Guard?

“A. Second Assistant Engineer, Steam; Third Assistant, Diesel.

“Q. How long have you had that license?

“A. Second Assistant, it has been approximately six years.

“Q. How long have you been employed by the States Marine Company?

“A. Since 1 August, 1950.

“Q. How long have you been aboard the SS Cotton State?

(Deposition of J. J. Green.)

“Q. The exact date I can't say. It was in November of '55.

“Q. What was your employment on the night of January 10th, 1957?

“A. I would have to check the records for the date.

“Mr. Howard: May he use the log, the [331] engine log? Or have you got the bell book handy there?

“Mr. Biele: I believe I had the wrong date. The date is the 12th, isn't it?

“A. No, it is the 10th.

“Q. What was your billet on the ship?

“A. Second Assistant Engineer.

“Q. What kind of ship is the Cotton State?

“A. C-2.

“Q. What kind of propulsion equipment does she have? A. Steam turbine.

“Q. How much horsepower does that turbine develop? A. 6,000.

“Q. What kind of a propeller does she have?

“A. Three-bladed propeller.

“Q. What diameter does the propeller have?

“Mr. Howard: If you recall.

“A. I couldn't state the exact diameter.

“Q. (By Mr. Biele): Could you state the pitch of the propeller? A. No.

“Q. When the vessel goes ahead, when the propeller goes ahead, does the wheel move from right to left or in a clockwise direction or a counterclockwise direction?

(Deposition of J. J. Green.)

“A. Looking from ahead or astern?

“Q. When the propeller is going ahead. [332]

“A. Yes, but where are you? Where am I? Am I looking back at it or am I looking forward at it?

“Q. Looking at it from aft.

“A. From aft?

“Q. Yes.

“A. It would be in a clockwise direction.

“Q. Is that what is considered to be a right-handed wheel? A. Yes.

“Q. Is the Cotton State equipped with jacking gear? A. With a turning gear.

“Q. What does that consist of?

“A. Actually, it is essentially the same as a jacking gear, but it consists of an electric motor which is engaged on a pinion shaft to turn the main engine while cooling down or prior to warming up.

“Q. How much horsepower does that electric motor have? A. Offhand I couldn't say.

“Q. Do you know how many revolutions per minute that motor turns——

“A. I have never checked it. According to the specifications, I believe it is approximately seven or eight.

“Q. Are you talking about the propeller?

“A. Seven or eight minutes for one revolution.

“Q. That is, the jacking or turning gear turns the propeller——” [333]

The Court: Incidentally, do Counsel agree that that is a long time, seven or eight minutes for one

(Deposition of J. J. Green.)

revolution of a propeller? Seven or eight minutes is a long time. Think how far you can go up and down these hills in ten minutes.

Mr. Howard: Your Honor, the propeller turns very slowly.

The Court: It surely must.

Mr. Howard: In the jacking gear.

The Court: You may proceed.

(The reading was continued as follows:)

"Q. Are you talking about the propeller?

"A. Seven or eight minutes for one revolution.

"Q. That is, the jacking or turning gear turns the propeller once every seven or eight minutes?

"A. That's right, approximately.

"Q. Where are the controls for the turning gear?

"A. There is one switch on the main switch-board, and there is a separate switch down below on the lower plate aft.

"Q. What has to be done to engage or disengage the operation of the turning gear?

"A. Well, to engage it you have to wind off the bolted locking device that locks the coupling on the turning gear away from the coupling on your pinion shaft. That has to be taken out and reversed. Then you have a hand [334] wheel that screws your coupling on the turning gear motor shaft into the coupling on the turbine pinion shaft, and it locks in place.

(Deposition of J. J. Green.)

“Q. How long in time would it take to engage the turning gear to the main motor?

“A. I would say approximately not more than two minutes.

“Q. How long would it take to disengage it?

“A. About 45 seconds.

“Q. How long does it take to start the electric motor that activates this mechanism?

“A. Myself, it takes not more than 45 seconds.

“Q. Does it require the pressing of a switch or—

“A. Yes, you have two switches. You have got to go from the top plate—not the top plate, but from the upper plate to the lower plate.

“Q. How long does it take to discontinue the electrical motor?

“A. That is pretty hard to say.

“Q. How long would it take to stop the rotation of the wheel? A. Just to throw the switch.

“Q. Does the motor thereafter cut out?

“A. Just a second.

“Q. Is there any means of communication between the engine room and the after deck on the Cotton State?

“A. I couldn't say for sure. I believe there is a telephone [335] back there, but I am not sure.

“Q. Have you ever used it? A. No.

“Q. Is there a speaking tube? A. No.

“Q. On the night of January 10th I take it you didn't have any communication by telephone with anyone on deck aft on the Cotton State?

(Deposition of J. J. Green.)

“A. No.

“Q. Did you have any conversation or discussion with anyone on deck about the arrival of certain scows alongside the vessel on that night?”

Mr. Howard: Do you want to go to the next question, Counsel?

(The reading was continued as follows:)

“Q. What time did the vessel arrive in Everett, Mr. Green?

“Mr. Howard: You can refer to the logbook on that, Mr. Green.

“A. You want the time when they were finished with the engines and all?

“Q. (By Mr. Biele): What time was the vessel finished with the engines?

“A. Finished with engines was at 1835.

“Q. What does that signify, that you were finished with the engines? [336]

“A. It means as far as I am concerned, or in the engine room as far as we are concerned, that the bridge is going to do no more maneuvering or backing, no more use for the main engines so we can secure them.

“Q. Now, when you say ‘we,’ were you on watch in the engine room?

“A. I wasn’t on watch. I was standing by with the man on watch.

“Q. Do you recall what the oiler and fireman were doing? A. Specifically I couldn’t say.

“Q. When you engaged the turning gear at this

(Deposition of J. J. Green.)

time did you inform any of the deck officers that you were engaging the turning gear? A. No.

“Q. Before the turning gear was started had you determined whether there were any barges or scows or vessels in the vicinity of the propeller?

“A. No.

“Q. Had you determined whether there was a watch maintained on the stern to see if everything was clear in the vicinity of the propeller?

“A. No.

“Q. You say ‘No’? A. No.

“Q. Did the turning gear immediately become effective? [337] A. Yes.

“Q. Did you determine before you started the turning gear whether any warning signs had been placed over the counter of the vessel?

“A. Yes.

“Q. After starting the turning gear did you remain in the engine room?

“A. For a short period of time.

“Q. How long did you remain in the engine room? A. That is impossible to say.

“Q. What were you engaged in doing?

“A. Starting the auxiliary feed pump.

“Q. Was anyone left to shut off the turning gear in the event of a sudden emergency?

“A. Not specifically for that. There were men in the engine room on watch.

“Q. Were you in the engine room when any indication of trouble occurred? A. No.

(Deposition of J. J. Green.)

“Q. Did you leave the engine room before the propeller was jammed or hung up?

“A. Will you repeat that one?

“(Last question read.)

“A. No—wait a minute. Yes, I did. I did, yes.

“Q. Where did you proceed after leaving the engine room? [338]

“A. I came up on deck Whether to my room or out on deck, I couldn't say.

“Q. You know that the propeller was jammed or struck sometime during the night of the 10th, do you not? A. Yes.

“Q. Did you observe anything in the way of the propeller or counter of the vessel? A. Yes.

“Q. What time did you make this observation you refer to? A. I couldn't state any time.

“Q. What did you observe?

“A. I observed that the propeller warning sign was hanging and that the warning light wire was torn from the beam.

“Q. Did you observe any scows or tugboats in the vicinity of the propeller? A. No.

“Q. When you left the engine room was there an engineer on watch? A. There was.

“Q. Who was that?

“A. Mr. Pilar was security watch.

“Q. The Fourth Assistant? A. Yes.

“Q. Did you leave any instructions with him as to the [339] performance of his duties?

“A. No instructions were necessary.

(Deposition of J. J. Green.)

“Q. Did you inform him that the jacking gear was engaged or the turning gear was engaged?

“A. I didn’t inform him. He saw me put it in.

“Q. I didn’t get the last part of that.

“A. I didn’t verbally inform him.

“Q. Did you make any entries in the engineer’s log the night of the 10th? A. Yes, I did.

“Q. Is that the engineer’s log that you have in your lap now? A. Yes.

“Q. What is Exhibit No. 6?

“A. What is Exhibit No. 6?

“Q. Yes.

“A. According to the notation, Exhibit No. 6 is the Engineer’s Logbook dated January 10th and 11th, 1957.

“Q. Is that record kept in the regular course of business of the ship? A. Yes.

“Q. Have you made entries in that book?

“A. Yes.

“Q. On that day? A. Yes. [340]

“Q. Did you make an entry as to the time you started the turning gear?

“A. Yes. The turning gear was engaged.

“Q. What time was that? A. At 1840.

“Q. Did you make any other entries on that date? A. Yes.

“Q. Will you tell us which ones you made?

“A. There are quite a few of them.

“Mr. Howard: Is it agreeable that he read all the entries that he made around that time?

“Mr. Biele: We can start from 1835.

(Deposition of J. J. Green.)

“Mr. Howard: 1835, the entries you made in the rough engine log.

“A. 1835. ‘Finished with engines at 1835. Counter, 37299820. Meter, 6781180. Port settler 10 feet 11 inches; starboard settler, 4 feet 4 inches. Secured steam to main engine and engaged turning gear at 1840. Both generators on the line, Port and Starboard boiler donkey. Guard and red light under stern.’

“Q. Are there any other entries subsequent to that made by yourself?

“A. Nothing prior to 1835—yes, there is prior to 1835.”

The Court: Will you wait just a minute. In everyday landlubber’s language what time is [341] 1835? Subtract 12 from 1800?

Mr. Howard: It would be 6:35 p.m., your Honor.

The Court: You may proceed.

(The reading was continued as follows:)

“Q. Are there any other entries subsequent to that made by yourself?

“A. Nothing prior to 1835—yes, there is prior to 1835.

“Q. We can eliminate those.

“A. But nothing the rest of the night or the next morning.

“Q. Mr. Green, when was your log written?

“A. My log was written prior to leaving the engine room.

(Deposition of J. J. Green.)

“Q. About what time was it that you left the engine room?

“A. I couldn’t state any definite time. It would be only approximately.

“Q. Were you aware when you left the engine room that the propeller had been struck or damaged? A. No.

“Q. When were you first aware of it? When was this first called to your attention?

“A. That the propeller was damaged?

“Q. Yes.

“A. It was after the inspection made by the Chief Engineer.

“Q. That it was struck?

“A. That it was struck. I had an indication that it may [342] have been struck when the jacking gear was kicked off the line due to the overload.

“Q. When you say the jacking gear, you mean the turning gear?

“A. The turning gear. I use them synonymously.

“Q. Were you in the engine room when it was kicked off the line? A. No.

“Q. Where were you when it was kicked off the line? A. I couldn’t say.

“Q. Do you recall how this came to your attention? A. Which?

“Q. That the turning gear was kicked off the line. A. I couldn’t say.

“Q. What do you mean by the expression ‘the turning gear was kicked off the line’?

(Deposition of J. J. Green.)

“A. The circuit was broken electrically. The electrical circuit was broken automatically.

“Q. Because of an overload or an unusual condition?

“A. Due to the overload. The overload protection in the device was operative or actuated.

“Q. You were not in the engine room when that occurred? A. No.

“Q. When you started up the turning gear, did you notify anyone on deck that you were doing this? A. No. [343]

“Q. Is there such a custom on the States Marine ships?

“Mr. Howard: What custom are you referring to?

“Mr. Biele: To notify the deck officers that the turning gear is started.

“Mr. Howard: Do you understand the question?

“A. Yes; I do.

“Mr. Howard: All right.

“A. No; it is not a custom to notify the deck.

“Q. (By Mr. Biele): Is it your statement that it is never done?

“A. Myself, it is never done.

“Q. Do you know what other engineers do?

“A. No. I know of no other engineer that does.

“Q. Did you observe the propeller of the Cotton State before you proceeded to Everett?

“A. No.

(Deposition of J. J. Green.)

“Q. Were you on watch during the passage from Seattle to Everett?

“A. I was not on watch.

“Q. Were you in the engine room?

“A. Yes.

“Q. During that passage did the propeller give any indications of vibration? A. No.

“Q. Did it give any indication of having struck something? [344] A. No.

“Q. Were you in the engine room during the whole trip from Seattle to Everett?

“A. I believe so.

“Q. Were you in the engine room when the vessel was preparing to get under way from Seattle? A. Yes.

“Q. Did any indication of striking occur then?

“A. No.

“Q. Would you state what Exhibit 8 is? Do you recognize it?

“A. Exhibit 8 is the Engineer's Bell Book.

“Q. Have you made entries in that bell book?

“A. I have.

“Q. Did you make any for the 10th of January?

“A. No.

“Q. Was there a night engineer aboard the Cotton State?

“Mr. Howard: When are you referring to, Counsel?

“Mr. Biele: On the evening of January 10th.

“Mr. Howard: At what time?

“Mr. Biele: At the time of docking.

(Deposition of J. J. Green.)

“The Witness: At the time of docking?

“Mr. Howard: Yes.

“A. No.

“Q. Do you know if a night engineer subsequently came aboard [345] the vessel?

“A. A night engineer came aboard.

“Mr. Howard: After docking?

“A. Yes.

“Q. (By Mr. Biele): Do you know when he came aboard?

“A. The time I couldn't specify.

“Q. Was he aboard when you started up the turning gear?

“Mr. Howard: Now, Counsel, do you mean when you say ‘aboard,’ was he in the engine room or in the same area where this witness was?

“Mr. Biele: My question was if he was aboard when he started up the turning gear?

“A. I couldn't say.

“Q. By that, you mean that he was not in the engine room or near where you were engaged?

“A. I didn't see him.

“Q. Do you recall the identity of the night engineer? A. I believe I can.

“Q. Who was he?

“A. By name I couldn't.

“Mr. Howard: By that you mean you could recognize him if you saw him?

“A. Yes.

“Q. (By Mr. Biele): Had he been aboard the vessel before? A. Yes. [346]

(Deposition of J. J. Green.)

“Q. At Everett or Seattle? A. Yes.

“Q. Do you know when he assumed his watch, if any, in the engine room?

“A. The time I couldn’t say.

“Q. Sir?

“A. I say, the time I couldn’t say, the specific time.

“Mr. Biele: I believe that is all I have.

“Mr. Gantt: I have no questions.

“Cross-Examination

“By Mr. Howard:

“Q. Have you served aboard other steam-turbine-driven ships than the Cotton State?

“A. Yes.

“Q. As an engineer? A. Yes.

“Q. A licensed engineer? A. Yes, sir.

“Q. Were those all operated by States Marine Lines, or have you served aboard turbine-driven ships operated by other companies?

“A. By other companies.

“Q. Can you name the other companies where you have been a licensed engineer on steam-turbine-driven ships? [347]

“A. No other companies as licensed engineer.

“Q. As an unlicensed man? A. No.

“Q. In what capacities?

“A. As engine caddie.

“Q. As engineer? A. Engine caddie.

“Q. What other companies?

(Deposition of J. J. Green.)

“A. American President Line and United States Line.

“Q. What type of ships were those?

“A. Victory ships, C-3.

“Q. American President and U. S. Lines?

“A. Yes.

“Q. Are those ships equipped with either jacking gear or turning gear? A. Yes, sir.

“Q. The same type of jacking gear on those ships?

“A. It accomplishes the same purpose, yes.

“Q. Will you state, if you recall, whether the American President Line ships and the U. S. Line ships had the same type of propeller warning boards for use on the stern or the counter?

“A. The same type? No.

“Q. A similar type? A. No. [348]

“Q. What, if any, warning was provided on those ships?

“A. They had a sign attached to the handrail.

“Q. Attached to the handrail?

“A. Along the counter of the stern.

“Q. Was that a removable sign or a fixed sign? By that I mean did it remain there all the time?

“A. I believe it did.

“Q. Have you seen other ships in which propeller warnings were painted on the stern or counter of the ship? A. I haven't noticed.

“Q. I believe you stated that it would take you about 45 seconds to disengage the jacking gear in the engine room.

(Deposition of J. J. Green.)

“A. Approximately that.

“Q. That is assuming your position is where?

“A. Assuming my position is—so that I am in a position to do it.

“Q. In any particular location in the engine room?

“A. At the switch for the turning gear.

“Q. What operations would consume this 45 seconds that you have estimated would be required to disengage it? What would you be doing during that 45 seconds?

“A. I would have to turn off the switch for the power on the motor. Then I would have to go over to the hand wheel on the turning gear, disengage the locking pin and screw out the coupling on the pinion. [349]

“Q. Does that complete it?

“A. That completes it.

“Q. In other words, what you refer to as disengaging the jacking gear on the turbine might be described as screwing it out of position?

“A. No; it is not ever screwed out of position.

“Q. It is not? A. No.

“Q. Would you make any distinction between what you have described as disengaging the jacking gear and simply stopping the operation of the jacking gear? A. Repeat that, please.

“Q. Is there any distinction between what you have described as disengaging the jacking gear and another operation which might be referred to as stopping the operation of the jacking gear?

(Deposition of J. J. Green.)

“A. Yes.

“Q. What would be the distinction?

“A. Stopping the jacking gear or turning gear, all you have to do is throw a switch.

“Q. How long does that take?

“A. If a fellow is at the switch, a fraction of a second.

“Q. Any longer period of time would depend upon your location at the time you determined that it should be stopped; is that correct? [350]

“A. Yes.

“Q. What difference is there between disengaging the jacking gear which you have described and screwing the jacking gear out of operation?

“A. The only difference is that there is this wing nut bolted locking device that insures that the turning gear cannot be coupled to the coupling on the pinion shaft.

“Q. Which would be an additional operation to be performed when you no longer intended to use the jacking gear for a period of time?

“A. That is right.

“Q. In order to stop the propeller or wheel from turning, would it be necessary to disengage the jacking gear? A. No.

“Q. What would be necessary?

“A. To throw the switch and cut the power off the motor.

“Q. In the manner you have just described?

“A. To throw any switch.

“Q. I am not sure that it clearly appears what

(Deposition of J. J. Green.)

the purpose of the jacking gear is. Would you go through that again? Just what does it accomplish?

“A. When the engine is in use it is hot, very hot. When you stop turning the engine over with the steam it cools down, and then in order to prevent a warping of the [351] rotor it has to be turned over so it cools down evenly throughout the surface area.

“Q. On what types of ships is it necessary to do that? A. All types of ships.

“Q. On what type propulsion is it necessary?

“A. On all types of propulsion except Diesel.

“Q. Except Diesel? A. Yes.

“Q. How long is the jacking gear usually operated? A. On this ship four hours.

“Q. On this ship. Is that true of other C-2's steam turbines that you are familiar with?

“A. No.

“Q. What? A. No.

“Q. How long would they do it on other ships?

“A. The length of time would vary with the specification of the Chief Engineer.

“Q. I take it, then, that the time the jacking gear is in operation on those ships is determined by the Chief Engineer's instructions to the watch engineer? A. That is right.

“Q. Or to the Assistant Engineer?

“A. Yes.

“Q. As a general rule, would you say that the jacking gear [352] on steam-turbine-driven ships is kept in operation for several hours after they are

(Deposition of J. J. Green.)

finished with the engines? A. Yes.

“Q. Does that always involve the turning of the propeller or wheel? A. Yes.

“Q. Can you state whether or not it is customary on the Cotton State to await any instructions from the Chief Engineer or other source before starting the turning gear? A. No.

“Q. What determines when you start the turning gear in operation?

“A. Well, upon securing the steam on the main engine.

“Q. That is done when?

“A. When the bridge is no longer in need of the engines or has finished-with-the-engine bell.

“Q. When they have a finished-with-the-engine bell? A. Yes.

“Q. Will you describe the propeller warning board that you have referred to, what it is made of and what size it is, approximately?

“A. I believe it is a piece of 1 by 6 lumber approximately 10 feet long.

“Q. What color?

“A. Red and white striped. [353]

“Q. Printing or lettering?

“A. I don't recall. It is supported at either end by line which is secured to the handrail on the stern of the ship.

“Q. The illumination?

“A. Illumination is by flashing red light.

“Q. Located where?

“A. On each end of the board.

(Deposition of J. J. Green.)

“Q. What is the source of power, if you know?

“A. A marine plug in the jackstaff area.

“Q. In the stern area of the ship?

“A. Yes.

“Q. I believe you testified in answer to a question by Mr. Biele that you had determined that warning signs had been placed at the stern?

“A. Yes.

“Q. Will you describe how you determined that?

“A. My determination is from the Chief Mate.

“Q. How did you receive that advice on the night of January 10th?

“A. I didn't receive actual verbal affirmation that they were in place. It was my personal understanding with him and I had assumed after tying up that they are placed in position.

“Q. Does the engineer on duty or on watch and the unlicensed [354] personnel in the engine room have the responsibility in connection with placing in operation the propeller warning boards?

“A. No.

“Q. You mentioned that a Mr. Pilar was actually on watch in the engine room upon your arrival at Everett on January 10th about 1835 hours. Did you actually secure the main plant and engage the turning gear yourself?

“A. I secured the steam, the main steam stops on the boiler, and started the turning gear.

“Q. You mentioned in answer to a question by Mr. Biele that in your experience you knew of no other engineer that undertook to notify the deck

(Deposition of J. J. Green.)

or the officer on watch on deck when the turning gear was engaged. Are you referring to the States Marine Line vessels, or are you referring to merchant vessels generally?

“A. Merchant vessels—strike the answer to that question, merchant vessels. That question could be ambiguous.

“Q. I am referring to U. S. merchant vessels.

“A. I don't mean ambiguous in that situation. The turning gear is engaged under different types of operation. It is engaged to start warming up and it is engaged to start cooling down.

“Q. I am referring now to a time when you receive a finished-with-engines bell. Now applying my question to that—— [355]

“A. I know of no other engineer.

“Q. On any merchant vessel?

“A. On any merchant vessel.

“Mr. Howard: I think that is all I have.

“Redirect Examination

“By Mr. Biele:

“Q. Mr. Green, was any damage sustained by the turning gear?

“A. None that has shown up yet.

“Q. When you engaged the turning gear did you leave the propeller in an ahead rotation or an astern rotation? A. I couldn't say.

“Q. You mentioned two switches to the turning gear, one being to the gear itself. Is there a second

(Deposition of J. J. Green.)

one on the operating platform, a switch on the main panel board? A. Yes.

“Q. Where is that second switch?

“A. It is on the main panel board on the star-board side of the engine.

“Q. Where is that with relation to the throttle or control?

“A. The throttle is inboard and forward.

“Q. Is it on the same platform?

“A. Yes.

“Q. How far away is the panel board from the switch on the throttle? [356]

“A. Approximately 15 feet, 15 to 20 feet.

“Q. Are there any warning lights or buzzers or alarm system of any sort on the turning gear to indicate an overload? A. No.

“Q. The only reaction would be the tripping out of the circuit breakers? A. Yes.

“Q. Do they have this type of equipment on reciprocating engines? A. No.

“Q. Do they have it on Liberty ships?

“A. No.

“Q. Are there any written orders aboard this vessel relating to the engaging or disengaging the operation of the jacking gear?

“A. Only that it has to be logged.

“Q. Only what?

“A. That it has to be logged, and upon warming up permission must be received from the bridge to start turning over.

“Q. Where are those orders contained?

(Deposition of J. J. Green.)

“A. I believe the Chief Engineer has company letters.

“Q. Does the Chief Engineer ever issue a set of instructions relating to the operation of the turning gear on the main engine?

“A. Only to the necessity of logging the operation and [357] receiving permission from the bridge upon warming up.”

The Court: “Upon warming up,” is that a mis-speaking by the witness? He is talking about warming up the vessel, is he not?

Mr. Howard: Warming up the engine.

The Court: Does that mean after warming up or before warming up or with reference to the subject of warming up? Do Counsel understand the term “upon warming up”? The Court does not.

Mr. Howard: I understand that, your Honor, to mean that he only has to receive permission from the bridge to start the turning gear upon a warming up operation, not on a cooling off operation.

The Court: You may proceed.

Mr. Biele: No, your Honor, that's not quite my understanding of it. They have to receive some assurance from the watch mate or from somebody on deck that things are clear before they start up the jacking gear.

The Court: My misunderstanding is made more acute due to the disagreement of Counsel. You may proceed. Proceed with the reading of the deposition.

(Deposition of J. J. Green.)

(The reading of the deposition was continued as follows:)

“Q. In response to Mr. Howard’s question you indicated that you assumed the warning boards were up when you started [358] the jacking gear?

“A. Yes.

“Q. But you don’t know of your own knowledge? A. I didn’t go back and see it.

“Q. Am I correct in my impression that a lapse of time occurred between the last turning of the propeller by the main engine and the first turning of the propeller by the turning gear?

“A. Yes.

“Q. How long a period elapsed when the propeller was motionless?

“A. The definite time I couldn’t say. I would say approximately, however, two minutes.

“Q. That would be two minutes following the last maneuvering order? A. Yes.

“Mr. Biele: May I see Exhibit 7, please?

“The Witness: Strike that last statement. I would say approximately between three and five minutes. It takes a little bit longer to bleed all the steam.

“Q. Would it be an accurate statement that the propeller was motionless from the time the last stop bell is shown in the engine room bell book?

“A. Until when?

“Q. Until you started the jacking gear? [359]

(Deposition of J. J. Green.)

“A. No.

“Q. Does the propeller turn in the interim between the last stop bell received from the bridge and the commencement of the jacking operation?

“A. It could have. In bleeding the steam from the lines you bleed it through the throttle.

“Q. How is that operation accomplished?

“A. The main water stops are secured and the steam allowed to drop, and in the process the steam drops approximately 25 per cent. The rest is bled through the throttle.

“Q. When you say you bleed the steam, you mean you empty all the steam that is in the boiler?

“A. No, no. The steam that remains in the lines and the throttle.

“Q. How many turns of the propeller would that steam impart? A. Maybe none.

“Q. Do you recall what it did on this occasion?

“A. No.”

Mr. Howard: That concludes the deposition of Mr. Green and I offer that in evidence, your Honor.

The Court: It is now received in evidence as a part of the libelant's case in chief with like effect as if the witness were present, were sworn and was testifying orally from the stand. Will you turn back to that phrase we were discussing and remind me of the page? At [360] the moment I don't—

Mr. Howard: Page 30, the last answer.

The Court: Wait just a minute.

(Brief pause.)

The Court: You may proceed with the libelant's case in chief.

Mr. Howard: I would like to next read the deposition of witness Pilar.

The Court: Proceed.

Mr. Howard: This is the deposition of Matthew G. Pilar taken at Seattle on April 10, 1958.

Mr. Crutcher: Commencing at Page 3, your Honor, on Line 10. Direct examination by Mr. Howard.

(The deposition of Matthew George Pilar was read as follows:)

DEPOSITION OF
MATTHEW GEORGE PILAR

"Q. Will you state your full name, please?

"A. Matthew George Pilar.

"Q. What is your address, Mr. Pilar?

"A. At the present time it is 4615 West Stevens Street, Seattle, Washington.

"Q. And what is your age?

"A. Forty-two.

"Q. Do you hold any license issued by the United States Coast Guard?

"A. Chief Engineer-Marine-Steam. [361]

"Q. Steam?

"A. Steam; any horsepower; any tonnage.

"Q. How long have you held a Chief Engineer's license?

"A. Oh, I don't know. Maybe 13 or 14 years.

(Deposition of Matthew George Pilar.)

“Q. Have you been going to sea as a licensed engineer during all that period?

“A. No; not all that period. I have been ashore for the past 10 years, I would say.

“Q. When did you return to service as a licensed engineer?

“A. That was January 7, 1957.

“Q. What was your ship assignment at that time? A. Fourth Engineer.

“Q. On what ship?

“A. SS Cotton State.

“Q. Where did you join the vessel?

“A. In Seattle.

“Q. At the present time, Mr. Pilar, are you employed?

“A. At the present time I am on my vacation, taking a trip off, but I am still employed, I guess, by the company. I figure on going back on the ship when it arrives as a Chief Engineer.

“Q. As Chief Engineer on what ship?

“A. The Cotton State.

“Q. Is that the same ship by the name of Cotton State that you previously mentioned as having joined as Fourth [362] Engineer on January 7, 1957?

“A. No; the ship previous to that was a C-2 named the Cotton State, and then there was a transfer made by the company when they acquired this one which is a Victory ship and which is named the Cotton State now.

“Q. Both operated by States Marine?

(Deposition of Matthew George Pilar.)

“A. Both by States Marine Steamship Company.

“Q. Do you have any plans to be in Seattle or in this area during the period of the next three to six months?

“A. I am leaving Seattle Saturday for New York, and I plan on staying there until the ship arrives somewhere in the States, and wherever that is, I will pick the ship up there.

“Q. In other words, you don't know when you will be back in the City? A. No; I don't.

“Q. Mr. Pilar, do you recall an incident occurring aboard the former Cotton State at Everett, Washington, on or about January 10, 1957, involving the propeller of that vessel?

“A. I do.

“Q. Were you aboard the vessel at that time?

“A. I was aboard.

“Q. What watch had you stood on the day that the accident occurred—what watch hours? [363]

“A. I was on a night security watch that night. That would be from 5:00 p.m. to 8:00 a.m., the next morning.

“Q. Prior to 5:00 p.m., had you stood any watch? A. I did. I was on day work.

“Q. And what hours did you work day work?

“A. That was from 8:00 a.m. to 5:00 p.m.

“Q. Were you on duty in the engine room during the time that the vessel proceeded from Seattle to Everett?

“A. I was in the engine room assisting the

(Deposition of Matthew George Pilar.)

Second Engineer. It was my watch, but the Second was sent down by the Chief Engineer to take over the watch and show me so I could pick up the plant because it had been quite awhile since I had been to sea, and there were a few things I wasn't sure of and I wanted to know. I didn't want it; it was the Chief's idea that the Second would be there to assist me, and I was only assisting him because he took over the watch.

"Q. Which engineer actually handled the controls in the operation of the plant during this voyage from Seattle to Everett on January 10, 1957?

"A. It was Mr. Green.

"Q. Was he the Second Engineer?

"A. He was the Second Engineer.

"Q. Did you remain in the engine room during the course of that passage? [364]

"A. I was down there all the time during the whole passage.

"Q. Now, you mentioned you were also working as a night security engineer from 5:00 p.m., on January 10, to 8:00 a.m. the following morning. State, please, what the duties and responsibilities were of the night security engineer on the Cotton State?

"A. Well, the responsibility of the night security engineer at that time was, when the night engineer came aboard the ship and took over the plant, he was to be aboard the ship. I could stay in my room. I could stay in my bunk. I could sleep. But I was responsible for the plant, and I was

(Deposition of Matthew George Pilar.)

aboard in case there ever was a need of help with the plant. I would assist him or help him out if there was any trouble.

“Q. Who was the night engineer that you have just mentioned?

“A. I don't recall his name. It is in the logbook here. Kane.

“Q. Was he a regular member of the ship's complement?

“A. A regular member of the ship's crew?

“Q. Right.

“A. No; he was a relief engineer.

“Q. What hours was he on duty aboard the vessel?

“A. His hours were supposed to be from 5:00 p.m. to midnight and another relief engineer comes at midnight to 8:00 a.m. [365]

“Q. Had you had any previous experience on C-2 type vessels before you joined the Cotton State on January 7, 1957?

“A. That was the first C-2 I ever had any experience with.

“Q. After the several days which you served on this vessel before this accident occurred, did you feel that you were competent and capable to take over the responsibilities of a night security engineer?

“A. I was. I felt I was capable of taking over as a night security engineer because I had been down there a couple of days, and it doesn't take long to learn the plant if you have had any ex-

(Deposition of Matthew George Pilar.)

perience with other plants. It is just a little different, and I picked up the few 'nicks' I figured I had to pick up.

"Q. Will you state whether you can identify the document which is before you, and which has already been marked for other deposition purposes as Exhibit 6? What is that document?

"A. It is the engine room rough log.

"Q. Does it include the period involved by this accident on January 10, 1957?

"A. What is that?

"Q. Does it include the period of this accident on January 10, 1957? A. It does.

"Q. Referring to the date and night of the accident, will [366] you examine the logbook and tell me if there are any entries in that logbook that were made by you? Let's refer first to the line designated as p.m., 1:00 to 4:00?

"A. No; there is nothing there.

"Q. Nothing in the 1:00 to 4.00 p.m. line?

"A. No.

"Q. Referring next to the 5:00 to 8:00 p.m., line, will you state whether or not you made any of the entries in that section of the logbook on January 10?

"A. From 5:00 p.m. to 8:00 p.m. I made the fuel oil settler soundings.

"Q. Are they the entries appearing towards the right-hand side of the page being P.S. 11'3" and S.S. 4'5"? A. That is right.

"Q. Those were made by you?

(Deposition of Matthew George Pilar.)

“A. Those were made by me.

“Q. And do you recall when those entries were made?

“A. Not exactly when. They were made after arrival. That is all I can say.

“Q. Referring to the other entries on the 5:00, 6:00 and 7:00 o'clock lines for January 10, do you recognize the handwriting?

“A. It looks like Mr. Green's handwriting—the handwriting of the Second Engineer.

“Q. Did you make any of the entries on any of those lines, [367] 5:00, 6:00 and 7:00?

“A. On line 7:00 I entered my signature as Fourth Engineer and night security.

“Q. That is towards the right side of the page?

“A. Yes.

“Q. Is that the only entry that was made by you on those three lines?

“A. That is the only entry I made.

“Q. Now, referring to the 8:00 p.m. line for January 10, will you examine that and tell me whether any of those entries were made by you?

“A. No, sir.

“Q. Do you know who made those entries?

“A. By looking at the handwriting, they were made by the night engineer, Mr. Kane.

“Q. Referring to the columns under temperatures: Sea, discharge, and condensate, do you find some check marks? A. I do.

“Q. Do you know who made those check marks?

“A. The Chief Engineer.

(Deposition of Matthew George Pilar.)

“Q. What do those check marks represent or stand for?”

Mr. Biele: Objection.

The Court: Overruled.

(The reading was continued as follows:)

“Q. Answer the question subject to that [368] objection.

“A. I didn’t hear what he said.

“Q. Do you know what those check marks stand for?

“A. Yes; they were made by the Chief Engineer.

“Q. What do they mean or what do they stand for?

“A. Well, the Chief Engineer usually marks a check mark if there is an entry made in the logbook which is wrong. These here must have been wrong because that is why the checks are there.

“Q. Do you find any check marks elsewhere on this page of the log? A. I do.

“Q. The next watch also has some.

“Q. On the 12:00 midnight line? Is that what you refer to? A. That is one I refer to.

“Q. Do you know who made those check marks?

“A. The Chief Engineer.

“Q. How do you know that those were made by the Chief Engineer?

“A. Because you can go through the logbook and you will find more marks like that by the Chief Engineer, and it is a mark the Chief Engineer

(Deposition of Matthew George Pilar.)

usually puts in when we make a mistake in our temperature reading columns or other mistakes or something we omit.

“Q. Will you state whether or not that was an understood practice as far as logbook entries in the engine room [369] log book of the Cotton State were concerned?”

“Mr. Biele: I will make the same objection that I previously made.”

Mr. Crutcher: And we renew that objection at this time, your Honor, the objection being that this engineer who had just come aboard the vessel was not qualified to testify to a custom aboard the ship, and that is actually what the question calls for, an understood practice; in other words, some subjective understanding so far as the witness is concerned.

The Court: Have you anything to say about it?

Mr. Howard: Well, your Honor, this witness continued to serve on this vessel for at least one voyage. He certainly should be in a position to testify as to whether this was a practice which they followed on this ship or whether it was common on all ships.

Mr. Crutcher: Your Honor, I would make the further objection that I can't understand what possible relevancy these check marks and temperature columns have to do with the accident that is involved here.

Mr. Howard: I can't either, your Honor, but this question was raised by Mr. Biele in his cross-

(Deposition of Matthew George Pilar.)

examination of witness Kane, and that's the reason I am going into it at this time in this deposition, to try and clear up the question which was opened up by [370] the cross-examination of Mr. Biele.

The Court: The objection is overruled.

(The reading was continued as follows:)

“A. It is not a standard practice by everyone, but by this Chief it was.

“Q. What licensed engineer was on duty and in charge of the engine room after the vessel was docked at Everett, Washington, on the evening of January 10?

“A. After the vessel was docked?

“Q. Right.

“A. Mr. Kane, the night engineer.

“Q. Now, did you observe Mr. Kane's presence in the engine room?

“A. I saw him there, yes.

“Q. When did you first see him?

“A. Well, a few minutes after we had finished with the engines. I don't recall the exact time.

“Q. Were you present in the engine room when the signal was given on the telegraph 'finished with engine'?

A. I was.

“Q. —which was logged at 1835 hours?

“A. I was.

“Q. Were you present in the engine room after that time when the turning gear was engaged?

“A. I was. [371]

(Deposition of Matthew George Pilar.)

“Q. Who engaged the turning gear?

“A. The Second Engineer, and I assisted him.

“Q. About how long was that done after the bell ‘finished with engines’ was received?

“A. To be specific, I can’t say, but it wasn’t more than four or five minutes.

“Q. What did you do after the turning gear was engaged?

“A. After the jacking gear was engaged the plant was usually secured. The night engineer was there, and the second engineer was relieved by the night engineer, and he left the engine room, and immediately after that I left the engine room.

“Q. Where did you go?

“A. I went up topside and had a cup of coffee.

“Q. What did you do next?

“A. I must have stayed topside—I don’t recall how long, but I did have a cup of coffee, and I decided to go back down below.

“Q. To the engine room?

“A. To the engine room.

“Q. Who did you observe in the engine room when you returned on that occasion?

“A. The Second Engineer and the night engineer were there and the jacking engine had just kicked out.

“Q. What did you observe as far as the condition of the [372] plant was concerned when you returned to the engine room?

“A. The condition of the plant was good except for the jacking gear being kicked out.

(Deposition of Matthew George Pilar.)

“Q. When you say ‘kicked out,’ what do you mean?

“A. Well, by kicked out, it stopped. It could be the overload or it could be something back aft hit the propeller to throw the overload switch out.

“Q. Did you ascertain at that time what caused the turning gear to kick out?

“A. At that time I did not know. I just had to look to see.

“Q. What did you do thereafter?

“A. Well, then I went back to see. They were talking. Someone by then came down. I don’t recall too much of what happened, but, anyway, after that I went up on top, and that is when they were talking about the barge hitting the propeller. That is when we went back aft, and the Chief was back there on the main deck.

“Q. The Chief Engineer was back aft on deck?

“A. At that time he was back there.

“Q. And what mate was back there?

“A. I don’t recall his name. I think it was the First Mate.

“Q. And where did you observe them?

“A. They were back aft at the fantail of the deck.

“Q. Did you go back there yourself? [373]

“A. I was back there.

“Q. Will you describe what conditions existed around the stern of the vessel when you got back there?

(Deposition of Matthew George Pilar.)

“A. When I got back there the warning light was damaged, and they already had it on deck.

“Q. On which side?

“A. On the starboard side.

“Q. And how was it damaged? Did you make an observation of it?

“A. Oh, I did at the time, but to tell you how it was damaged—the board was broken, I know.

“Q. What did you do after that, Mr. Pilar?

“A. After that I went back down in the engine room. I don’t know how long I stayed down there after that.

“Q. Do you know when the turning gear was placed in operation again?

“A. The exact time, no.

“Q. Who was on duty in the engine room when you returned to it after going out to the stern of the vessel? A. Who was on duty?

“Q. In the engine room?

“A. When I left the engine room?

“Q. When you returned to the engine room after being out on the stern of the vessel?

“A. The night engineer, Mr. Kane. [374]

“Q. Did you observe any barges or other floating craft alongside the vessel when you were out on deck?

“A. I did. I think there was another barge there, too.

“Q. Where was it located?

“A. Well, right now the exact position I don’t

(Deposition of Matthew George Pilar.)

know. It was on the starboard side at about No. 4 hatch.

“Q. Was there a barge——

“Mr. Biele: Are you shaking your head that you don’t know?

“The Witness: I don’t know.

“Mr. Biele: Is that why you are shaking your head?

“The Witness: I don’t know. They were there, but the exact spot I don’t know.

“Q. When you went out on deck and back to the stern of the vessel was there a barge under the stern of the vessel?

“A. There was a barge there.

“Q. Describe what was on the barge.

“A. Lumber.

“Q. Can you state whether or not the barge was in contact with the propeller or rudder of the vessel at that time?

“A. At that time? I don’t know. It has been so long ago, I can’t remember that incident very clearly.

“Q. Mr. Pilar, will you state from your experience as a licensed engineer on merchant vessels what the customary [375] practice has been with respect to when the turning gear is engaged after a vessel is docked?

“A. After it comes into a dock the customary practice is to engage the turning gear as soon as we get ‘Finished With Engines.’ We secure the plant. Steam is off the engine and we automatically

(Deposition of Matthew George Pilar.)

engage the jacking engine or what is called the turning engine. That is our usual procedure.

“Q. In terms of minutes or hours, how long after? A. Four or five minutes.

“Q. After you get the ‘Finished With Engines’ bell, how soon is the turning gear or jacking gear engaged?

“A. In four or five minutes it is engaged. If the ship is coming in to port, the Second Mate is back aft, and he usually checks to see that everything is clear. If there is anything there, we know almost immediately. We will know immediately that it isn’t clear and we wait for the Clear—the moment we get the ‘Finished With Engines’ and we don’t hear anything from the bridge, we engage it immediately after ‘Finished With Engines’ which is three or four minutes.

“Q. Is that the procedure which was in effect on the Cotton State on the day this accident occurred?

“A. That is the procedure that was in effect there.

“Q. Is there any different procedure in effect generally on [376] merchant vessels as to the engagement of the turning gear in preparation for leaving a dock or going to sea?

“A. On leaving a dock it is altogether different. We always call the bridge to get a clearance before engaging the electric engine because the ship may lie alongside a dock for a day or so or maybe hours, and something could have pulled up along-

(Deposition of Matthew George Pilar.)

side the propeller, a barge or anything like that, so we never turn the jacking engine until we get the clearance from the bridge. The mate usually checks back there and lets us know everything is in proper order to engage the jacking gear or engine.

“Q. What was the procedure in effect aboard the Cotton State after you joined it on January 7, 1957, regarding logging of times when the jacking gear was engaged or in operation?

“A. May I have it again?

“Q. Was there any procedure specified aboard the Cotton State after you joined it on January 7, 1957, regarding the logging of entries as to times when the jacking gear was engaged or in operation?

“A. There was by the Chief Engineer. He mentioned it to me, and I guess to the other engineers, more than once to enter in the logbook every time the jacking gear was engaged.

“Q. Were there any written instructions posted or in effect [377] aboard the Cotton State on January 10, 1957, regarding the engagement of the turning gear? A. I didn't see any there.

“Mr. Howard: You may cross-examine.

“Cross-Examination

“By Mr. Biele:

“Q. Mr. Pilar, what time was it that you went to work on the morning of the 10th?

“A. The 10th?

(Deposition of Matthew George Pilar.)

“Q. Yes. A. That is the day——

“Q. That is the day of the accident.

“A. In the morning I went to work.

“Q. What was the first time you went to work?

“A. 8:00 o'clock a.m.

“Q. And you remained on watch how long?

“A. Until 5:00 p.m.

“Q. Then at 5:00 p.m. you stayed on? Did you stay on watch, or were you observing the second assistant engineer in your study of the plant?

“A. At 5:00 p.m. I don't remember when the ship started to move, what time, but at 5:00 p.m. I was on watch, and when the ship started maneuvering the Second Engineer came down to do the maneuvering, and I was observing [378] and seeing how it was done so I would know the next time it was done.

“Q. Had you ever maneuvered the ship before?

“A. Not a C-2, no.

“Q. I take it by that answer you had never maneuvered the Cotton State—that particular ship?

“A. The Cotton State, no.

“Q. Now, you remained in the engine room until the vessel got to Everett?

“A. That is right.

“Q. —observing the second assistant engineer? A. That is right.

“Q. When you got to Everett the second assistant engineer was the one to engage the jacking gear?

(Deposition of Matthew George Pilar.)

“A. Well, I assisted. I was there to learn how and all of that.

“Q. You had never engaged a jacking gear before?

“A. Not on the Cotton State. I have engaged lots of others. They are all about the same, but they will have a little different trick maybe, you know.

“Q. Now, between the time you had ‘Finished With Engines’ at 1835 and the time you had gotten the jacking gear engaged, were there any maneuvers made on the engine? A. What is that?

“(Question read.) [379]

“A. No.

“Q. Did you have to bleed out any steam?

“A. Opened the drains.

“Q. Did you apply it to the turbine?

“A. The drain is on the main steam line.

“Q. Did that have the effect of turning the propeller? A. No.

“Q. How long did it take the second engineer to start up the jacking gear?

“A. The jacking engine itself?

“Q. Yes; how long did it take him to engage it—to get it running?

“A. A minute and a half or two minutes at the most. Wait. I am mistaken. It doesn’t even take that long. You just press the switch and she is engaged.

“Q. And that starts the propeller rotating?

(Deposition of Matthew George Pilar.)

“A. That starts the jacking engine to turn the propeller.

“Q. I take it from your direct testimony you had no word one way or the other from the bridge about whether or not the stern of the vessel was clear?

“A. No. That was the usual procedure that we engage the jacking engine immediately after ‘Finished With Engines.’

“Q. And you didn’t know whether the stern was clear or not?

“A. We didn’t hear anything from the bridge so we would assume—— [380]

“Q. You didn’t hear anything from the bridge, so you assumed it was clear?

“A. We assumed it was clear.

“Q. After the jacking gear was engaged how long was it that you remained in the engine room, you, personally?

“A. In exact minutes I don’t know. It wasn’t very long. Maybe five or ten minutes.

“Q. When you left the engine room, was Mr. Kane in the engine room?

“A. He was there.

“Q. Was Mr. Green, the second assistant, in the engine room when you left the engine room?

“A. He was on the way up ahead of me, and I left after he did.

“Q. You left after he did?

“A. He probably wasn’t up to the top when I started up.

(Deposition of Matthew George Pilar.)

“Q. How long had Mr. Kane been in the engine room before you left?

“A. That is vague to me on the time. It could be five or ten minutes. I don’t know.

“Q. Do you have any idea why the second assistant left the engine room?

“A. There was no need for him to be there any more. The night engineer was there to relieve us.

“Q. Did you have any knowledge or indication at the time you [381] left the engine room that the jacking gear was in trouble or was going to kick out or had kicked out?

“A. The jacking gear was running when I left.

“Q. Did you have any discussion or talk with Mr. Kane, the relief engineer?

“A. No; I didn’t. I had seen him there, and I didn’t say anything. The second engineer did all the talking to him.

“Q. Did you overhear the second engineer talking to him? A. I did.

“Q. Where did they have their conversation?

“A. Right by the log desk.

“Q. Where were you?

“A. I was in the vicinity of the log desk looking and checking things over for myself.

“Q. Did the second assistant leave any written instructions to the night engineer that you know of? A. Not that I know of.

“Q. Mr. Pilar, a jacking gear such as was on the Cotton State at this time isn’t found on a Liberty ship, is it? A. No, sir.

(Deposition of Matthew George Pilar.)

“Q. And it isn’t found on a Diesel-driven ship?

“A. Not this type, no.

“Q. Ships that have turbo-electric drives don’t have that type of equipment, do they? [382]

“A. Not this type of jacking gear.

“Q. Ships with reciprocating engines don’t have this type of equipment, do they?

“A. No. What does this have to do with all of this?

“Q. Just to be certain in my mind, after you and the second assistant started the jacking gear, what was your next movement or what did you do next? A. After we started——

“Q. After you completed or finished with the jacking gear, what did you do then?

“A. I checked over the plant to see that everything was all right. It is normal procedure to check it over, and the night engineer was there, and the plant was secured, and we left.

“Q. And that took maybe five or ten minutes?

“A. I am vague on the time. It could have been five minutes or ten or fifteen minutes. I don’t know. It has been so long ago I don’t know. I get relieved so many times I don’t remember.

“Q. Now, you don’t know when the jacking gear kicked out, do you? A. No.

“Q. You don’t know who was in the engine room when the jacking gear kicked out?

“A. The night engineer was in the engine [383] room.

“Q. Did he discuss it with you?

(Deposition of Matthew George Pilar.)

“A. What?

“Q. Did he discuss that with you and say he was in the engine room when the jacking gear kicked out?

“A. I came down after the jacking engine was kicked out, and he said the jacking gear kicked out.

“Q. Did he say it kicked out while he was in the engine room?

“A. It had to be while he was there.

“Q. You mean he was there when you left and he was there when you returned, so you assume he was there all the time?

“A. He was there when I left, and he was there when I came back.

“Mr. Biele: That is all.

“Redirect Examination

“By Mr. Howard:

“Q. Do I understand from your answers to questions by Mr. Biele regarding the jacking gear on these types of vessels that while they may not have the same type, they have some other type of jacking gear? A. They do.

“Mr. Howard: Do you waive reading and signing of this deposition?

“The Witness: I do. [384]

(Deposition of Matthew George Pilar.)

“Recross-Examination

“By Mr. Biele:

“Q. Let me ask this. Mr. Howard brought it up. You don’t turn over the propeller on reciprocating engine ships when you get into port, do you? A. No, sir.

“Q. You don’t start up the propeller as soon as you finish with engines on steam reciprocating ships?

“A. No, but they have a jacking engine on them.

“Q. But you don’t start up the propellers as soon as you get into port when you finish with engines? A. No.

“Q. And you don’t do it on a Diesel-driven ship? A. No.

“Q. And you don’t do it on a turbo-electric ship? A. No.

“Redirect Examination

“By Mr. Howard:

“Q. Do you do it on all turbine-driven ships?

“A. We do.

“Q. What kind of ships are C-2 ships?

“A. Turbo-driven ships—steam turbo.

“Q. And are the jacking gears started up immediately after arrival at the dock and finished with engines on all [385] steam turbo ships?

(Deposition of Matthew George Pilar.)

“A. They are.

“Q. And are the jacking gears started up again before departure from a dock on all steam turbo-driven ships?

“A. Usually an hour prior to departure.”

Mr. Howard: We offer that deposition in evidence, your Honor.

The Court: It is received in evidence as a part of the libelant's case in chief with like effect as if that witness were here and sworn and testified orally from the stand. At this time we will take a short recess.

(Short recess.) [386]

November 28, 1958—After Midafternoon Recess

(All parties present as before.)

The Court: You may proceed.

Mr. Howard: Your Honor, I would like to recall Captain McLaughlin.

The Court: Is there any objection to the fact that the clerk is not here?

Mr. Biele: No, your Honor.

Mr. Howard: No objection.

The Court: Court is in session. You may now proceed.

ETHON C. McLAUGHLIN

recalled as a witness in behalf of libelant, being previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Howard:

Q. Captain McLaughlin, will you state what the procedure is at ports on the West Coast of the United States with respect to who provides the mooring lines for barges that are brought alongside merchant vessels?

The Court: The clerk is now present. You may proceed.

Mr. Crutcher: Your Honor, I will object [387] to that question on the ground no proper foundation has been laid for asking such a question.

The Court: Will you read the question, Mr. Reporter?

(The reporter read the last question.)

The Court: The objection is sustained, with leave to qualify the witness.

Mr. Crutcher: May it please the Court, I would also like to object to the question on the grounds that it is not material to any question in this case. It has already been established——

The Court: The Court will see if that objection is made later. The Court will not rule upon that objection now because the question that will bring

(Testimony of Ethon C. McLaughlin.)

out this answer is not before the Court or Counsel.
Proceed.

Mr. Howard: Your Honor, may I make a statement in connection with this?

The Court: You may.

Mr. Howard: This witness and other witnesses have testified that the line used to secure the forward end of one of these barges was provided from the ship. I wish to show by this witness that that is the common and usual and accepted practice at ports on the Pacific Coast, that there should be no significance attached to [388] the fact that the line was provided by the ship rather than the barge. This has come up in the course of discussions with the Court earlier today on this very question.

The Court: The Court's ruling last announced regarding the privilege extended to qualify the witness will still stand.

Q. Well, Captain, are you familiar with the practice at ports on the Pacific Coast with respect to who furnishes lines to secure barges alongside merchant vessels?

The Court: Answer yes or no.

A. Yes.

The Court: Did you ask him if he was qualified?

Mr. Howard: I asked him if he was familiar with the practice.

The Court: Then you may proceed.

Q. (By Mr. Howard): What is that practice?

Mr. Crutcher: Your Honor, I will object at this

(Testimony of Ethon C. McLaughlin.)

point. The testimony in this case by this very witness has already established that the line in this case was provided by the vessel. There is no dispute on that and I don't see what relevance custom has to do with it.

The Court: The objection is overruled. [389]

Q. (By Mr. Howard): What is the practice, Captain?

A. It is the practice that the ship furnish the lines for all barges that come alongside on the West Coast.

Q. Does that include the port of Everett?

A. That includes the port of Everett, with the exception——

Q. One exception?

A. One exception. If an oil barge come alongside to fuel up, there's a crew always on board that barge and they pass us their line.

Q. Now I refer you again to the situation of unmanned barges; that is, barges that don't have a crew of their own aboard.

A. That's right, sir, the only time that we furnish lines for is where they're not manned.

The Court: I think his last answer is confused in statement, if not in thought. I do not understand the answer.

Q. (By Mr. Howard): Captain, with barges of the type that are involved in this case, lumber-laden barges which are towed by a tug and which barges have no crew of their own apart from the crew that is supplied by the tug, what is the prac-

(Testimony of Ethon C. McLaughlin.)

tice with respect to who furnishes the barge mooring lines?

A. The practice is that the ship furnishes the lines.

Q. Is that true at Everett? [390]

A. Yes, sir.

Q. At Seattle? A. Yes, sir.

Q. And other West Coast United States ports?

A. Yes, sir.

Mr. Howard: That's all.

The Court: You may cross-examine.

Cross-Examination

By Mr. Crutcher:

Q. Mr. McLaughlin, how many times prior to 1955 had you been in the port of Everett?

A. Prior to that I was sailing out—not into port of Everett. The first time in the port of Everett.

Q. Do I understand, then, that on the occasion of this accident on January 10, 1957, this was the first time that you had ever been in the port of Everett? A. That was.

Mr. Crutcher: On the basis of that, your Honor, I move to strike the answer of the witness as not relevant and as not competent evidence and testimony.

The Court: The Court knows no reason for so limiting the source of his information. It has not been shown that that is the only information he

(Testimony of Ethon C. McLaughlin.)

ever had or ever gained about it. The objection and motion are [391] overruled and denied.

Q. (By Mr. Crutcher): Captain, had you discussed the question of who would furnish lines with anyone on this particular occasion when the vessel Cotton State went into Everett? A. No, sir.

Q. Had you previously to that time had any occasion to discuss the custom at the port of Everett in that regard with anyone else? A. No, sir.

Q. Have you since that time discussed the matter of custom at the port of Everett with anyone other than Counsel? A. No, sir.

Mr. Crutcher: I have no other questions, your Honor.

Redirect Examination

By Mr. Howard:

Q. Was the practice which was followed at Everett on this occasion the same as you had had experience with at other ports on the Pacific Coast? A. Yes, sir.

The Court: He has not stated the source of his knowledge, if he had any, and he said he had knowledge. He has not been asked what the source was. [392]

Q. (By Mr. Howard): Well, what is the source of your knowledge with respect to the practice of furnishing barge lines, Captain?

A. In Long Beach, San Francisco, Oakland—

The Court: The question is what is the source of your knowledge about what the custom was and

(Testimony of Ethon C. McLaughlin.)

the practice was at Everett. You say you never were there and you never talked with anybody about it. The question is, from what source did you gain the information which you said you had of a knowledge of such a custom.

A. Well, as far as Everett was concerned, I didn't know a barge was coming alongside until I saw them when I came from aft.

The Court: I am going to have to grant the motion. Mr. Howard.

Mr. Howard: Well, your Honor, I would like to point out that my question to this witness was not limited to the port of Everett. My general question was at West Coast ports of the United States. After he had answered that question, then I asked him about Everett and Seattle.

The Court: The Court will reconsider the motion if that is all the testimony to be had from this witness.

Mr. Crutcher: Your Honor, I do renew the [393] motion on the ground that while I don't concede that this matter is relevant at this stage of the proceedings, I certainly can't see any foundation for what the witness has said was the practice.

The Court: The motion is granted for the reason that up to now the state of the record shows to this Court and the Court finds, concludes and decides from the evidence adduced up to this time that it has not been positively proved that this witness had any knowledge about the custom or prac-

(Testimony of Ethon C. McLaughlin.)

tice as to who furnished the lines at the port of Everett before this occasion.

Mr. Howard: Then the motion that the Court is granting only relates to his testimony at the port of Everett?

The Court: The port of Everett.

Mr. Howard: Very well, your Honor.

The Court: And regarding his answer concerning what the custom was about furnishing lines at Everett.

Mr. Howard: I am satisfied with the record, your Honor, with the witness' answers to the other questions.

The Court: You may proceed. Any other questions of this witness?

Mr. Crutcher: Your Honor, I believe it is [394] Mr. Howard's redirect at this point.

Mr. Howard: I have no other questions.

Mr. Crutcher: I have no questions.

The Court: Step down.

(Witness excused.)

The Court: Proceed with the libelant's case in chief.

Mr. Howard: The libelant rests, your Honor.

The Court: The libelant rests. The respondents and cross-libelants may now proceed.

Mr. Crutcher: Thank you, your Honor. Call Mr. Knowles.

ROY E. KNOWLES

called as a witness in behalf of respondents and cross-libelants, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Please state your full name to the Court.

A. Roy E. Knowles, K-n-o-w-l-e-s.

Q. Where do you live, Mr. Knowles?

A. Route 1, Box 202, Monroe, Washington.

Q. And what is your profession?

A. Marine surveyor.

Q. How long have you been engaged in the practice as a [395] marine surveyor?

A. Since 1946.

Q. Prior to that time had you had any experience in the merchant marine? A. Yes, sir.

Q. When was that?

A. From 19—in the merchant marine from 1919 to 1935.

Q. And prior to that time I believe you had been in the United States Navy? A. Yes, sir.

Q. Did you receive any license from the United States Coast Guard while you were in the United States Navy? A. Yes, sir.

Q. State to the Court what that license or those licenses were.

A. Third assistant and first assistant engineer while I was in the Navy.

Q. And thereafter while you were in the merchant marine did you receive further licenses?

(Testimony of Roy E. Knowles.)

A. Chief engineer unlimited, yes, sir.

Q. When was that? A. 1921, February.

Q. And did you have any service in the merchant marine as chief engineer?

A. Yes, I did. [396]

Q. Would you tell the Court briefly what that experience was?

A. Well, approximately eight years I was chief engineer.

Q. Serving aboard vessels? A. Yes, sir.

Q. And thereafter were you employed by the United States Department of Commerce?

A. As an assistant inspector of boilers.

Q. Was that a function subsequently taken over by the Coast Guard Service? A. Yes, it was.

Q. When did you enter service with the Coast Guard itself?

A. When they took the Bureau over, and I believe it was in 1942.

Q. And did you continue as an inspector for the Coast Guard? A. Until January, 1946.

Q. Was your service as a marine inspector continuous from 1935 until 1946 for the federal government? A. Yes, sir, it was.

Q. Would you state to the Court briefly what sort of duties you performed as an inspector?

A. Well, inspector of hulls and boilers, machinery.

Q. Was that of the merchant marine?

A. The merchant marine exclusively, yes.

Q. Since 1946 I believe you said you've been a

(Testimony of Roy E. Knowles.)

professional [397] marine surveyor. What sort of work do you specialize in?

A. In hull and engines.

Q. Are you familiar with the propulsion machinery and machinery generally connected with the engine room so far as merchant marine vessels of the United States are concerned? A. Yes.

Q. On January 18, 1957, did you attend a survey of the scow Eclipse No. 15 at Lake Union Dry Dock? A. Yes, I did.

Q. And were you there representing both the owners of the SS Cotton State and The Pacific Tow Boat Company?

A. I represented the underwriters of the SS Cotton State.

Q. Was that the hull underwriters?

A. The hull underwriters, yes, sir.

Q. And did you also represent The Pacific Tow Boat Company? A. Yes, I did.

Q. And subsequently did you attend a survey of the damaged propeller of the SS Cotton State?

A. I did.

Q. Arising out of the same accident?

A. Yes, I did.

Q. Mr. Knowles, handing you a photograph of the side of the damaged vessel——

The Clerk: It will be marked Respondent's [398] Exhibit No. A-1.

(A photograph was marked Respondents' Exhibit No. A-1 for identification.)

(Testimony of Roy E. Knowles.)

Q. (By Mr. Crutcher): I ask whether you recognize the subject matter of that photograph?

The Court: Answer yes or no.

A. Yes.

Q. (By Mr. Crutcher): Will you tell the Court what that photograph represents?

A. Well, it represents the side and the chine of the Eclipse Barge 15.

The Court: Photo of what?

A. Chine.

The Court: How do you spell that word?

A. C-h-i-n-e.

The Court: Of the side and chine?

A. Yes, sir.

The Court: Will you please say what that is?

A. The chine is the knuckle or the side here of the barge.

The Court: What is the difference between the side and chine? They are not the same thing, are they?

A. All right, the side.

The Court: Side of what? [399]

A. The barge Eclipse 15.

The Court: E-15?

A. Yes, sir.

The Court: Proceed.

Q. (By Mr. Crutcher): Does that show the appearance of the barge Eclipse No. 15 while it was in dry dock, Mr. Knowles? A. Yes, sir.

Q. Did you examine the damage which is shown in that photograph? A. Yes, we did.

(Testimony of Roy E. Knowles.)

Q. By "we" do you mean there was another surveyor?

A. I and another surveyor representing other interests.

Q. Would you describe to the Court the damage to the barge as you observed it very briefly?

A. Well, the barge was damaged on the bottom and through the side members and up seven planks on the side.

The Court: How far from the outer edge inward of the barge was the bottom damaged. the bottom planking?

A. I believe it was seven planks, sir.

The Court: Seven planks?

A. I have my survey report, sir. I can look——

The Court: And the side?

A. That is visible.

The Court: How many planks were damaged on the [400] side.

A. The seventh plank is——

The Court: On the side up to the seventh plank counting from the bottom or the water level?

A. Yes, sir.

The Court: Is that six planks or is that seven planks?

A. The seventh plank is damaged.

The Court: You may ask him another question.

Q. (By Mr. Crutcher): Did you measure to find out how far aft of the stern of the barge that damage appeared?

A. That was forty feet aft of the bow.

(Testimony of Roy E. Knowles.)

The Court: Is that the location——

A. Of the damage, yes, sir.

The Court: The fore and aft location?

A. Yes, sir, forty feet aft of the bow.

The Court: At a point forty feet aft of the bow.

A. Yes, sir.

The Court: How long is the vessel?

A. 110 feet.

The Court: You may inquire.

Q. (By Mr. Crutcher): Could you observe any markings which would indicate a cut on the side of the barge? A. Yes. [401]

Mr. Howard: I beg your pardon, I didn't get the last question.

The Court: Read it, Mr. Reporter.

(The reporter read the last question and answer.)

Q. (By Mr. Crutcher): How many of those were there, if there were any?

A. There were two.

The Court: Two what?

A. Cuts.

Q. (By Mr. Crutcher): Assuming that this barge had been under the counter of the SS Cotton State prior to your examining it and that the barge had been struck by the propeller of the SS Cotton State, the propeller being driven by the jacking gear, can you state to the Court whether from your examination of the barge hull, and I refer to the barge, of course, Eclipse No. 15, you could see evi-

(Testimony of Roy E. Knowles.)

dence from which you could form an opinion as to whether it had been struck more than once by the propeller?

A. We were all of the opinion that the barge had been struck twice.

Q. Can you state whether, had the barge been struck only once by the propeller, the damage would have been less than it was?

A. We have to consider that the after cut or the smaller [402] cut was the first cut, because, the propeller was going in the astern motion, and it would be my answer that the second cut would cause a little more damage than the first cut.

Q. In terms of cost of repair, Mr. Knowles, did the second cut make a difference so far as materials and time and labor spent for repairs were concerned? A. Yes.

Q. Are you familiar with the repairs which were effected to this barge?

A. Yes. We wrote up the specification.

Q. Did you afterwards examine the repairs?

A. Yes, we did.

Q. Were you shown a bill of materials for the repairs?

A. We drew up a bill of materials when we got the price.

Q. Are you familiar with the materials that did go into the repairs? A. Yes.

Q. Will you state to the Court what the difference in the second cut meant in terms of added cost of repairs and labor, if you know?

(Testimony of Roy E. Knowles.)

A. Well, we didn't break it down at the time of the survey, but looking at this it would be in my opinion approximately 30 per cent.

Q. Are you familiar with the practice of turning a jacking [403] gear on a steam turbine vessel after the vessel is finished with engines?

A. Yes.

Q. Have you done that yourself?

A. Yes, I have.

Q. On many occasions? A. Yes.

The Court: How many occasions? Did you say how many occasions?

Mr. Crutcher: I beg your pardon.

Q. (By Mr. Crutcher): Can you estimate for the Court about how many times you have done that?

A. Well, I would say maybe fifty times. I wouldn't know. In many ports.

Mr. Howard: The last few words?

A. I said in many ports. I've been around the world and I wouldn't know, but let's say fifty times.

Q. (By Mr. Crutcher): And what sort of vessels were these that you were engaged in?

A. They were steam turbine.

Q. Well, were they merchant vessels?

A. Merchant vessels.

Q. Is there any routine practice with respect to the action taken by the engine room in starting the jacking gear after the vessel is finished with engines and after the [404] propeller has ceased turning? You can answer that yes or no, Mr. Knowles.

(Testimony of Roy E. Knowles.)

A. Yes.

Q. Are you familiar with that practice?

A. Yes.

Q. Would you tell the Court what that practice is so far as communication with the deck is concerned?

A. It is that you get permission from the bridge. You are notified that the stern area is clear.

Mr. Crutcher: I have no other questions, your Honor.

The Court: You may cross-examine.

Cross-Examination

By Mr. Howard:

Q. Mr. Knowles, after this accident occurred on January 10, 1957, you were asked to survey the damage for both the States Marine Line underwriters and the underwriters for The Pacific Tow Boat Company, is that correct?

A. I believe so, yes, sir.

Q. So you were working for both the libelant in this case and one of the respondents in this case?

A. I represented the underwriters for the Cotton State.

Q. Yes, and representing the underwriters you're really representing the vessel's interests then, are you not? [405]

A. I presume you come back to that, yes.

Q. Yes, and you're actually paid then by both of them, aren't you?

A. Paid by the Lloyd agents.

(Testimony of Roy E. Knowles.)

Q. For the work you did for the Cotton State?

A. Yes.

Q. As well as for the work you did for The Pacific Tow Boat Company. So if I called you, you would be willing to testify as a witness in this case in the same fashion as if you were called by the other side, is that correct?

A. I would, and I'd have to tell the truth. That's what I'm up here for.

Q. I haven't asked you to appear as a witness, have I?

A. No.

Q. You were working for both interests at the time, were you not?

A. I would say so.

Q. And before you were called to testify today in this case did you consult with Mr. Biele and Mr. Crutcher concerning the testimony that you have given?

A. Well, I was shown this picture, yes, and we talked over two or three items.

Q. How many times did you discuss this testimony with them?

A. Well, once—twice.

Q. Twice? [406]

A. Not what I was going to say, but my survey report.

Q. And did they ask you what your testimony would be about the use of the communication with the bridge before the engineer engaged the jacking gear?

A. Yes.

Q. Did you recall at that time that you had already been employed by the States Marine Corpora-

(Testimony of Roy E. Knowles.)

tion and had been paid by its underwriters for services performed in this case?

A. I raised the question.

Q. Did you have some reservation in your mind as to whether you should appear as a witness in this case?

A. Yes, I did.

Q. And you were advised by Counsel that it would be quite all right, is that correct?

A. That's right.

Q. So do you think that your testimony here is given on a strictly impartial basis or is it given on the basis of your prior employment in this case?

A. Prior appointment by you?

Q. By either party or both parties.

A. Well, it's strictly impartial.

Q. As you view it? A. As I view it.

Q. I take it that you've never served on a C-2 as an [407] engineer, have you?

A. No, I have not.

Q. There weren't any C-2's in existence when you were serving as chief engineer on vessels, is that correct?

A. That's correct.

Q. They were built after you quit going to sea, isn't that right?

A. That is right.

Q. So you can't testify as to anything from your own personal experience as an engineer on C-2 type vessels?

A. No.

Q. Now, Mr. Knowles, I want to be sure the Court and Counsel understand your testimony correctly. There weren't seven planks damaged on the bottom of this barge, were there?

(Testimony of Roy E. Knowles.)

A. There were six—I just read my report—there were six on the bottom and nine on the side.

Q. There were six on the bottom and nine on the side. What is this seven that you testified to earlier?

A. There are seven planks loosened fore and aft of the cut that had to be refastened and recalked.

Q. I see. Well, that doesn't refer to the extent that the damage extended in from the side along the bottom; it's six, not seven, is that right?

A. That's right.

Q. How wide are those planks, incidentally?

A. They are twelve inches.

Q. Twelve inches, so that represents about six feet then of damage from the side in on the bottom of the barge, is that right?

A. That's right.

Q. At the extreme point of damage, is that correct?

A. That would be correct.

Q. Now, Mr. Knowles, it is pretty difficult for you as a surveyor to sit here and tell us how many times the barge was struck by a propeller that was turning by a jacking gear, isn't that correct?

A. Well, I think if you will examine the picture, and it was our opinion there when we were talking about it that the thing had been struck twice.

Q. It was your opinion?

A. It was not only mine, it was the other surveyor's also.

Q. Well, we're not interested in your telling us about the other surveyor, I want your opinion now.

(Testimony of Roy E. Knowles.)

A. I'm of the opinion it was struck twice.

Q. Now, it could have been struck more than twice, couldn't it?

A. It could have been if the propeller went up through this large hole, yes.

Q. Now, Mr. Knowles, as you know, the three blades on the propeller of the Cotton State were damaged in this [409] accident, don't you?

A. Yes.

Q. You surveyed that damage, didn't you?

A. Yes.

Q. For the States Marine Line? A. Yes.

Q. And also for The Pacific Tow Boat Company? A. Yes.

Q. So you know that not two but three blades of the propeller were damaged? A. Yes.

Q. All right. Then isn't it true that the propeller struck that barge three times and not two times?

A. No. No, one blade was waived by the Cotton State as being——

Q. Was what?

A. The damage on one blade was waived by the Cotton State as being previous damage, known.

Q. How many blades are there on the Cotton State? A. Well, there's three.

Q. Are you sure?

A. No, I think there's four.

Q. All right.

A. There's three blades——

Q. There's four blades on the Cotton State. [410]

A. Four blades.

(Testimony of Roy E. Knowles.)

Q. And there were three blades damaged in this accident, weren't there?

A. I'll have to go back, but there was one blade that was broken that was not attributed to this accident. There was three blades damaged.

Q. In this accident, is that correct?

A. Yes.

Q. Then it was a four-bladed propeller, wasn't it?

A. That's right. You had testimony that I listened to that it was a three-bladed.

Q. So you were influenced by that other testimony that you listened to and you weren't giving us just your own opinion on it?

A. Only just the fact that it was a three-bladed for a minute. I knew it was a four-bladed.

Q. Yes, all right. Well, then isn't it a fact, Mr. Knowles, that this propeller struck this barge not twice but three times?

A. That's right. It must have gone through there somewhere.

Q. And it just doesn't show on the picture, does it?

A. No, it would be in this jumble of timber.

Q. Yes. It's kind of difficult then for you to segregate the damage between the number of times that the propeller struck that barge, isn't it? [411]

A. Well, it would—you couldn't say positively, apparently.

Q. There's not much left to your statement that there's thirty per cent more when it was hit the

(Testimony of Roy E. Knowles.)

second time by the propeller because you now admit that it was hit three times by the propeller?

A. Yes, I was assuming that this original damage was the one that only has three planks damaged.

Q. Yes. So that means that your prior estimate of thirty per cent is incorrect, isn't that correct?

A. Well, there are two distinct cuts here in this barge, I would say.

Q. Yes.

A. One of them, the top one, the larger one, would apparently be approximately thirty per cent more to repair it than if it had only been touched here on the smaller one.

Mr. Howard: That's all I have.

Mr. Crutcher: I have no questions.

The Court: Step down. Call the next witness.

Mr. Crutcher: Oh, I beg your pardon, your Honor. Before the witness leaves the stand I would like to have the picture admitted in evidence.

The Court: Any objection? Any objection to A-1?

Mr. Howard: No objection, your Honor. [412]

The Court: Admitted.

(Respondents' Exhibit No. A-1 for identification was admitted in evidence.)

The Court: You may step down.

(Witness excused.)

Mr. Biele: Mr. Stuchell.

Mr. Crutcher: Your Honor, before this examination begins may I ask that Mr. Knowles be excused?

The Court: Any objection?

Mr. Howard: I would like to ask if Mr. Knowles is going to be available in the Seattle-Monroe area here until next Monday or Tuesday.

Mr. Knowles: Yes, I will be.

Mr. Howard: Then I have no objection, your Honor.

The Court: You may be excused from appearing so far as your past subpoena or arrangement is concerned and go on about your business. Proceed.

HARRY WILLIAM STUCHELL

called as a witness in behalf of respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Biele:

Q. Mr. Stuchell, will you state your full name?

A. Harry William Stuchell.

The Court: S-t-u-c-h-e- what?

A. l-l.

Q. (By Mr. Biele): Where do you live, Mr. Stuchell?

A. 902 Rucker, Everett, Washington.

Q. What is your occupation?

A. I'm a partner in the Eclipse Lumber Company.

(Testimony of Harry William Stuchell.)

Q. Who are the other partners in the Eclipse Lumber Company?

A. My father and Mr. William Carpenter.

Q. Do you have a job with Eclipse Lumber Company aside from the proprietary interest in the concern?

A. Yes, assistant manager.

The Court: Will you name the partners, please? Yourself and who else?

A. My father, E. W. Stuchell.

The Court: And who else?

A. W. D. Carpenter.

The Court: I did not get the last.

A. Carpenter.

The Court: Is that all the partners?

A. Well, there are three partners in Seattle.

The Court: You may proceed.

Q. (By Mr. Biele): Who are the partners in Seattle, Mr. Stuchell?

A. M. A. Wyman, M. H. Wyman and David E. Wyman. [414]

Q. What do you do for Eclipse Lumber Company?

A. I'm the assistant manager. I look after the operation of the plant.

Q. Do you look after the employment of the people employed by the company?

A. Indirectly now.

Q. What was your position on January 10, 1957?

A. I was superintendent of the plant.

Q. Is the Eclipse Lumber Company the owner of the scows Eclipse No. 25 and No. 15?

(Testimony of Harry William Stuchell.)

A. Yes.

Q. How long has the company owned those scows?

Q. Quite a number of years. I don't know off-hand.

Q. Do you recall an incident on January 10th of 1957, when the scow Eclipse 15 was damaged?

A. Yes.

Q. How did that incident come to your attention?

A. I was called at approximately 7:00 o'clock by Mr. Wallace.

Q. And where were you when you were called?

A. At home.

Q. And what did Mr. Wallace tell you, if anything?

A. He told me that one of the scows had been sunk alongside the ship.

Q. Who was Mr. Wallace that you testified to?

A. He is one of the managers of The Pacific Tow Boat Company. [415]

Q. Now, did you do anything in response to that telephone call?

A. I called my father and we went down to the ship together.

Q. What ship did you go down to?

A. The Cotton State.

Q. Where was the Cotton State?

A. At Pier 1.

Q. And what time did you get to the Cotton State?

A. About a quarter after 7:00.

(Testimony of Harry William Stuchell.)

Q. When you got to the Cotton State did you observe anybody employed by Eclipse Lumber Company aboard the ship? A. No.

Q. Do you know if anybody from the Eclipse Lumber Company had been aboard the ship prior to that?

A. Nobody; none that I know of.

Q. Did anybody aside from you and your father go aboard the Cotton State on that night?

A. Not aside from Mr. Wallace.

Q. Mr. Wallace is employed by Pacific Tow Boat Company——

The Court: Ask him, do not tell him.

A. Yes.

The Court: Some day in something important to you you may run the risk of thinking you may have the testimony of a witness in the record on something and all you will have in the record is an assertion by you, [416] and you are not under oath. You should try to break yourself of that habit.

Mr. Biele: Thank you, your Honor.

The Court: Proceed.

Q. (By Mr. Biele): Mr. Stuchell, have you checked the employment records of the Eclipse Lumber Company for the 10th of January, 1957?

A. Yes.

Q. Did you find in those records any indication that anyone from your company had been employed aboard the Cotton State on the night of January 10th?

A. No.

Mr. Biele: That's all I have, your Honor.

The Court: You may inquire.

(Testimony of Harry William Stuchell.)

Cross-Examination

By Mr. Howard:

Q. What is your age, Mr. Stuchell?

A. Thirty-four.

Q. How many people do you have in the employ of the Eclipse Lumber Company?

A. It varies from 175 to 200.

Q. Do you maintain a record of where all those people are at any particular time?

A. How do you mean? [417]

Q. Well, do you maintain a record of where each person is working at a particular date and hour?

A. No.

Mr. Howard: That's all.

The Court: Step down.

Mr. Biele: May the witness be excused, your Honor?

The Court: Any objection?

Mr. Howard: No objection.

The Court: You are excused, Mr. Stuchell, and may return to your work if you wish.

(Witness excused.)

Mr. Biele: Captain Keezer.

LEONARD KEEZER

called as a witness in behalf of respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Biele:

Q. Mr. Keezer, will you state your name?

A. Leonard Keezer.

The Court: How do you spell the last name?

A. K-e-e-z-e-r.

Q. (By Mr. Biele): Mr. Keezer, where do you live?

A. I live at 6023 Dexter, Everett. [418]

Q. How old are you? A. Forty-six.

Q. Are you married? A. Yes.

Q. Mr. Keezer, what is your occupation?

A. I'm captain on a towboat for Pacific Tow Boat Company.

Q. What towboat are you captain of?

A. The tug Lea Moe.

Q. How long have you been captain of the tug Lea Moe?

A. Oh, eight or nine years anyway.

Q. What experience have you had prior to that time as captain of the Lea Moe?

A. I've worked with the company about fifteen years steady.

Q. In what capacity did you work before you went on the Lea Moe?

A. I was captain on the tug Sea Horse and the tug Sea Imp.

(Testimony of Leonard Keezer.)

Q. And where were those tugs employed?

A. In Everett harbor and Snohomish River.

Q. Where has the tug Lea Moe been generally employed since you have been captain these last few years?

A. All river and harbor there in Everett.

Q. Captain Keezer, what kind of a tug is the Lea Moe? A. It's a 61-foot diesel tug.

Q. And what is her normal complement when working in and around Everett harbor? [419]

A. Three men.

Q. What kind of——

The Court: Does that include the captain?

A. Yes, it does.

Q. (By Mr. Biele): And what kind of engine controls do you have on the tug Lea Moe?

A. I didn't understand that.

Q. What kind of engine controls do you have on the tug?

A. You have the engine controls from the wheelhouse. It's a direct reversing engine, they call it.

The Court: Direct——

A. Direct reversing, your Honor.

Q. (By Mr. Biele): Is it necessary to have an engineer on the tug? A. No, sir, it isn't.

Q. What kind of employment generally has the tug been used for since you've been captain?

A. It is used for the towing of logs and lumber barges mostly.

(Testimony of Leonard Keezer.)

The Court: That is what the Lea Moe is used for principally?

A. The towing of logs and barges, your Honor.

Q. (By Mr. Biele): Where have those lumber barges been towed?

A. Mostly in and out of the river.

The Court: The Eclipse is located on the [420] river away from the——

A. Yes, it is, your Honor.

The Court: Near what is referred to as Old Everett, is it not?

A. Yes, it is, your Honor.

The Court: You may proceed.

Q. (By Mr. Biele): Captain Keezer, were you the master of the Lea Moe on January 10, 1957?

A. Yes, sir. I was.

Q. Who was with you on the tug at that time?

A. Two men, Larry Hafey and John Anderson.

Q. And what were their jobs on the tug?

A. They were deck hands on the tug.

The Court: How do you spell Hafey?

A. H-a-f-e-y, your Honor.

The Court: You may proceed.

Q. (By Mr. Biele): Had Mr. Hafey served with you before that occasion?

A. Yes, about a year.

Q. Had you observed his performance of duties? A. Yes. I had.

Q. What can you state as to the manner in which he performed his duties?

A. Well, I considered him a very capable man.

(Testimony of Leonard Keezer.)

Q. Now, who was the second man that was on the tug. [421] A. John Anderson.

Q. And his job was?

A. His job was deck hand also.

Q. Had he served with you before the 10th of January? A. At least several months.

Q. And how had he performed his duties?

A. He was a capable man also.

Q. Captain, did you have the job of shifting the scows Eclipse No. 15 and Eclipse No. 25 to the Cotton State on that date? A. Yes, I did.

Q. Will you describe to the Court what cargo, if any, was aboard the scows 15 and 25?

A. They were both loaded with lumber.

Q. How much of the deck area was covered with lumber?

A. Oh, I would judge it would be—you mean the area of the scow?

Q. Well, how far out to the side did the lumber go?

A. You have about twenty inches along the side of the scows and you have several feet on each end where there isn't any lumber.

The Court: What is that for, that space?

A. That is for walking and mooring and to be able to work around on the ends of the scows.

Q. (By Mr. Biele): Captain, do you recall the arrival of [422] the Cotton State at Everett?

A. Yes, I do.

Q. About what time did she arrive?

(Testimony of Leonard Keezer.)

A. She arrived pretty close to 6:00 o'clock; 1800 that would be.

Q. Did you make any offer of assistance to help the Cotton State into the berth when she arrived?

A. We run over there but he evidently didn't need any assistance, so we went back to get our scows to be ready when he was tied up.

Q. Did the berthing of the Cotton State appear to you to be satisfactory and expeditious?

A. Yes, it did.

Q. Now, Captain, where did you go then to get the scows?

A. We went to what we call West Cove, which is a thousand feet or less from where the ship docked.

Q. When you went to West Cove were the scows made up in a tow?

A. Yes, they were.

Q. How were they made up, Captain?

A. We had previously close-coupled them so that they were fitted tight together and the coupling lines between them were as tight as we could get them by hand.

Q. What do you mean by "close-coupled"?

A. That means the two ends of the scows were right together [423] and the lines were as short and as tight as we could get them by hand.

Q. How many lines were led between the two scows?

A. There was one—there was the two lines.

Q. Where were the lines placed?

(Testimony of Leonard Keezer.)

A. On the stanchions on each side, on each corner where they butted up against each other.

Q. What kind of lines were those, Captain, that you used?

A. Oh, they were five, about five-inch Manila, something in that neighborhood.

Q. Captain, was there a purpose in making up the scows close coupled in the manner you have described?

A. Yes; there was.

Q. What was that purpose?

A. The purpose was to make the two scows as one unit so that they would be better to handle in coming alongside of the ship.

Q. Did the manner in which the scows were made up keep the scows from kinking or wobbling?

A. Yes, it did. That was our purpose in close coupling, to make them as one unit, to make them as one barge.

Q. Would the close coupling keep the scows straight in line as you towed them?

A. Yes; it did.

The Court: That is to say, your towing [424] line closely coupled, is that what you mean, or do you mean some tied lines between the two barges?

A. It's the tieline between the two barges, your Honor, tying them tight together.

Q. (By Mr. Biele): Captain, how much clearance, if any, was there between the two scows after you had finished close coupling them?

A. Very little. About all you would get is what little stretch you'd get out of the lines.

(Testimony of Leonard Keezer.)

Q. Would you care to indicate to the Court what that clearance might have been?

A. Well, I would say not over two feet.

Q. Captain, did you take the two scows in tow thereafter? A. Yes; I did.

Q. How did you take them in tow?

A. By a short Manila line to the tow bitts of the tug.

Q. Where was that line fastened to the scows?

A. To the starboard stanchion on the lead scow.

Q. And how long was that line that you used as the towing line?

A. That line was long enough just so to give the stern of the tug clearance from brushing against the scow as you turned.

Q. That towing line was not the line that close coupled the scows, was it? [425]

A. No, sir; that was a line from the barge to the tug.

Q. Captain Keezer, which scow was towed first as you started out?

A. Eclipse No. 25 was towed as the bow.

Q. And which was the stern?

A. Eclipse No. 15 was behind.

Q. Had you received any orders as to which scow was to go to which hatch before you started out?

A. According to my orders the scows were to go one to number one hatch and one to number four hatch, but there was no distinction as to numbers.

(Testimony of Leonard Keezer.)

Q. Captain, could you have taken the No. 25 in tow first without any difficulty?

A. I don't understand that.

Q. Could you have taken No. 25 in tow first?

Mr. Howard: I object to that because the witness has testified he did do that, take 25 first.

Mr. Biele: I misspoke myself. I meant No. 15.

Q. (By Mr. Biele): Could you have taken No. 15 first?

A. Yes; I could have. It just happened that they were—as long as it didn't make any difference and they were facing that way, I took 25 ahead.

The Court: What kind of lumber or timbers were on these barges, particularly E-15?

A. Your Honor, they were assorted [426] timbers, about four to six inches thick and maybe ten inches the other dimension, and I suppose twenty feet long.

The Court: There were no squares there, were there?

A. No; there was none what we call Jap squares, your Honor.

The Court: Squares is what I mean to say.

A. Yes.

The Court: You may proceed.

Q. (By Mr. Biele): Captain, was it possible for you to proceed directly from West Cove to the place where the Cotton State was berthed?

A. Well, it was possible to proceed directly, yes, except that I swung a little wide when approaching the ship to come in at the proper angle.

(Testimony of Leonard Keezer.)

Q. Now, where was it that you swung wide to make the approach at the Proper angle to the ship?

A. Four or five hundred feet off the ship, off the stern of the ship.

Q. Did you then approach the slip where the Cotton State was berthed?

A. Yes; I did.

Q. As you approached the stern of the Cotton State, will you state how the scows were towing?

A. The scows were handling very well and I had no difficulty [427] with them at all.

Q. Did you encounter any unusual currents?

A. I didn't experience any current at all.

Q. Did you anticipate any current?

A. It was low water and it should have been slack water at that time if there was any.

The Court: Slack; you mean no current, do you?

A. No; no current, that's right, your Honor.

The Court: You said it was supposed to be. Was it in fact that kind of water?

A. No; there was nothing there to affect it at all, your Honor.

The Court: There is not very much salt water that gets up there, is there, or is there?

A. Yes, your Honor, it is salt water, although the river comes out quite close there.

The Court: Does the flow of the tide affect the movement or action of the water there at that place where the Cotton State was moored? Does it do that normally or ordinarily, or——

(Testimony of Leonard Keezer.)

A. There is very little current by there anyway even at any stage of the tide, your Honor.

The Court: You may inquire.

Q. (By Mr. Biele): Was the lack of current that you encountered what you anticipated? [428]

A. Yes; it was.

Q. Captain Keezer, as you approached or were abeam of the Cotton State's stern, did you pass off that part of the ship?

A. Did I pass where?

Q. Did you pass the Cotton State's stern?

A. I passed the stern of the Cotton State I suppose about sixty or seventy feet off.

Q. And what side of the Cotton State did you pass off?

A. That would be the starboard side.

Q. As you passed the stern of the Cotton State did you see any warning signs on the stern of the vessel?

A. No; I didn't.

Q. Did you see a red blinking light on the stern of the Cotton State?

A. I absolutely did not see any red blinking light.

Q. If such a light had been posted do you think you would have seen it?

A. I surely would have seen a red blinking light, yes.

The Court: How long have you been towing lumber barges at and about that mill while lumber carriers, ocean carriers of lumber, were moored there for the purpose of loading lumber possibly?

(Testimony of Leonard Keezer.)

A. I have been putting scows alongside of ships, your Honor, for about fifteen years anyway. [429]

The Court: Did you or did you not know where to expect the location of propellers on ships to be, with or without a light indicating it?

A. I had planned to go clear forward so as to stay away from it anyway.

Mr. Howard: I move to strike that answer as not responsive.

The Court: The Court will have to strike it. I would like you to state whether or not your experience was such that you needed to have a light in fact in order to be aware of the fact as to the location of the rudder on a ship.

A. Your Honor, I stated that I was sixty or seventy feet off, and that was my reason for being that far off, so that—I didn't want to take any chances, I wanted to stay clear.

The Court: Were you aware of the location of the rudder on that ship when you were drawing those barges alongside?

A. Yes; I was, your Honor.

The Court: You may proceed.

Q. (By Mr. Biele): Captain, did you have any trouble in seeing the Cotton State on that occasion?

A. No; I didn't. The visibility was good, I would say.

Q. Now, Captain, as you proceeded past the stern of the [430] Cotton State, where were the deck hands that you had with you, Mr. Hafey and

(Testimony of Leonard Keezer.)

Mr. Anderson? A. They were on deck.

Q. Did there come a time that Mr. Hafey went aboard one of the scows?

A. When we were practically—really when he went aboard the scow was after he heard the shouting from this man on the ship, and we wanted to find out what he wanted.

Q. Now, you said you heard shouting from a man on the ship. Where did you hear this?

A. He was on the stern of the ship when we first went by and he started shouting at us.

Q. Was that as the Lea Moe was fifty to sixty feet off the stern of the Cotton State?

A. Yes; it was.

Mr. Howard: Sixty to seventy feet off?

The Witness: Sixty to seventy.

Mr. Biele: Sixty to seventy. I misspoke myself.

Q. (By Mr. Biele): Were you able to understand what this gentleman was shouting about?

A. No; I wasn't.

The Court: Try to keep your voice raised clear and distinct, Mr. Biele. Sometimes it is sort of subdued.

Q. (By Mr. Biele): Captain, as you entered the slip and passed the stern of the Cotton State, what was your [431] intention with regard to the landing of the scows?

A. I had intended to go clear forward to number one hatch with both scows, make the one fast and then drop the other one back to number four hatch later.

(Testimony of Leonard Keezer.)

Q. Was that your original plan when you had started out from West Cove?

A. Yes; it was.

Q. Did you receive any change in orders regarding the manner or way in which the scows were to be spotted?

A. The man on the ship told us that he wanted the lead scow at number four hatch.

Q. That was the number——

A. That was the No. 25.

Q. 25.

A. And the trailing scow around up to number one hatch.

Q. That was a reversal of what you had intended, was it not? A. Yes; it was.

Mr. Howard: I object to that as leading, your Honor.

The Court: The objection is sustained. That is not necessary. This man is such an experienced navigator.

Q. (By Mr. Biele): Captain Keezer, did you recognize this person that gave the orders as anybody from Pacific Tow Boat Company? [432]

A. No; I knew that it was nobody from Pacific Tow Boat Company.

Q. Did you recognize——

The Court: Please, for my convenience, read that question and answer, Mr. Reporter.

(The reporter read the last question and answer.)

(Testimony of Leonard Keezer.)

Q. (By Mr. Biele): Did you recognize this gentleman as anybody that you had dealt with from the Eclipse Lumber Company?

A. Nobody that I would know from Eclipse Lumber Company, no.

Q. Did you recognize this person as anyone you could identify? A. No; I didn't.

Q. Captain, what orders did you receive from this person that you mentioned?

A. He put the line down at the forward part of the midship house and indicated he wanted the scows tied there, and so we proceeded with that.

Q. Did you land the scows at the forward part of the midship house? A. We did.

Q. Where was that in relation to where you had originally intended to land the scows

A. That was probably two hundred feet farther aft than I had intended to stop. [433]

Q. If you had not received those orders would you have gone forward to number one hatch

A. I certainly would, yes.

Q. Captain, what kind of a landing did you make in bringing the scows alongside the forward end of the house?

A. I considered it a good landing and a very normal landing.

Q. What part of the scow or scows was it that you brought alongside the forward end of the house?

A. That was the forward end of the leading scow.

(Testimony of Leonard Keezer.)

Q. And that would be the No. 25?

A. 25, yes, sir.

Q. When the landing was made, Captain Keezer, where was Mr. Hafey?

A. Mr. Hafey was on the bow or the head end of the leading scow over next to the ship.

Q. When had he gone on the leading scow?

A. He went from the stern of the tug onto the scow shortly after the man started shouting from the ship in order to find out what he wanted.

Q. Where was Mr. Anderson at the time the forward scow was brought alongside the forward side of the house?

A. He stayed on the stern of the tug to handle the lines.

Q. And what did you do at that time?

A. I brought the scow up and braked the headway on it and then held it in position until they could get the line [434] secured from the ship.

The Court: The captain will have to come back later anyway. I think we will have to conclude. That terminates today's proceedings at this point, Captain. You may step down. I wish I could say that we might start this at some time Monday. I cannot say so, but I want to very badly. Those connected with this case are excused until Tuesday morning, that is December 2nd, at 10:00 o'clock.

I do not know when I ever said anything like this in my service as a trial judge, but if I ever saw a lawsuit that at this stage of it would be an ideal one for settlement, this one is. I realize I

(Testimony of Leonard Keezer.)

have not heard any great amount of the respondents' testimony, but I have heard a lot of the cross-examination. I have read these briefs and the record very carefully, and in the light of the briefs and the record and the pretrial and the various contentions and what we have heard up to now I cannot restrain myself from making the statement I have just made.

Those connected with the case may now retire until next Tuesday morning at 10:00 o'clock.

(Thereupon, at 4:50 o'clock p.m., a recess herein was taken until 10:00 o'clock a.m., Tuesday, December 2, 1958.) [435]

December 2, 1958—10:00 o'Clock A.M.

(All parties present as before.)

The Court: You may resume the proceedings in the case now on trial.

Mr. Biele: Your Honor, we would like to file another memorandum in this matter.

The Court: Do you think there is involved in it any case which involves facts which are among other material facts that the lines from the moored vessel had been passed to and had already been affixed to, tied to the moving vessel, and that thereafter and not before the accident happened? Do you have any such?

Mr. Biele: Your Honor, in my original brief I cited the case of the West Indian-Eureka, I think

it is. That case is a case where the lines were attached to the ship.

The Court: West Indian what?

Mr. Biele: Eureka. It's in my original memorandum, your Honor, and that is one case where the ship was condemned for not having a lookout and acting when the lines were attached from the ship to the scow.

The Court: Do you have another one?

Mr. Biele: I think also, your Honor, the Nounes case which I have in my original memorandum is [436] a case of that type where there were lines from the ship.

The Court: Will you spell the name, please? I want to be sure.

Mr. Biele: J. L. Nounes. It's N-o-u-n-e-s, your Honor.

The Court: N-o-u-n-a-s?

Mr. Biele: It's J. L. Nounes, N-o-u-n-e-s, versus the United States of America.

The Court: It is e-s instead of a-s, is that right?

Mr. Biele: e-s, your Honor, yes.

The Court: Is there another one that you claim involves those facts among others?

Mr. Biele: And I think the Seas Shipping case is one, your Honor, where the lines were attached, and that's 92 Federal Supplement 902. I'm sure in the first two cases the lines were attached to the ship, your Honor, when the accident happened.

The Court: Do you know of any in the Ninth Circuit?

Mr. Biele: No, your Honor, I haven't come upon

any. This seems to be a sort of a situation that is more litigated in the East than it is in the West.

The Court: Yes; I noticed that. One of the cases not reported in the West reporting system but in [437] the A. M. C. is that 1935 case of the Maryland judge. I cannot quite call his name. Is it Chester?

Mr. Howard: Hektor.

The Court: No; Hektor is the name of the case.

Mr. Crutcher: Chestnut.

The Court: The judge who decided it, Judge Chestnut, that is the judge. Judge Chestnut was an admiralty judge of some considerable note and his opinions rate well in the admiralty law, but like most other judges they are not the only ones to consider.

Mr. Biele: I consider that Counsel conceded that that case was not applicable to this matter, your Honor, the other day.

The Court: On what distinguishing fact do you understand?

Mr. Biele: I'm just trying to remember now, but I——

The Court: It was employees of——

Mr. Biele: It was employees of the stevedore that did it, yes, your Honor.

The Court: The persons who were causing the action that resulted in the collision were employees of those other than the moving vessel.

Mr. Biele: Yes, your Honor.

The Court: They were not actually [438] em-

employed by the moving vessel, they were employed to do work as longshoremen, as I recall.

Mr. Biele: That's right; the control was not in the ship at the time.

The Court: You may proceed.

Mr. Biele: Captain Keezer, will you resume the stand?

The Court: Counsel I hope are advised on both sides the Court has a strong question mark, a very deep query as to whether or not that point is not one of the most——

Mr. Howard: I beg your pardon, your Honor, I didn't hear that last.

The Court: The Court has a very strong question mark in mind as to whether or not that question of who put out the lines and when they were put out from the moored vessel to the moving vessel before the accident, first, were they put out effectively before the accident; thereafter who was moving and what happened to move the moving ship into the point of collision. You may proceed.

LEONARD KEEZER

resumed the stand.

Direct Examination

(Continued)

Mr. Biele: Will the clerk mark this?

The Clerk: It will be Respondents' Exhibit No. A-2. [439]

(A U. S. Coast & Geodetic Survey chart was marked Respondents' Exhibit No. A-2 for identification.)

(Testimony of Leonard Keezer.)

The Court: If I were making a chart of that part of the Snohomish River, I think one of the objects that I would note on the chart would be the location of the Eclipse lumber mill. The mill probably has been there as long as any other mill now operating in Everett and it has probably been one of the biggest economic units in the community, and it is a strange thing to me it would not be indicated on that map. It may be there, but I did not see it. What do you call this thing you have had marked as Respondents' Exhibit A-2, Mr. Biele?

Mr. Biele: Your Honor, this is United States Coast and Geodetic Survey Chart No. 6448.

The Court: 64——

Mr. Biele: 48.

The Court: You may proceed.

Mr. Biele: Which is an official chart of the Everett harbor and approaches.

Q. (By Mr. Biele): Captain, will you tell us if you recognize what you have in front of you as Respondents' Exhibit No. A-2?

A. Yes; I do.

Q. Will you tell the Court what that is? [440]

A. It's a chart of Everett harbor and part of the Snohomish River.

Mr. Biele: We move the admission of this exhibit, your Honor.

The Court: Mr. Keezer, does it or does it not include a portrayal of the ground and water locations at or about the place where the Eclipse mill is located?

(Testimony of Leonard Keezer.)

A. Yes; it does, your Honor, but it's not marked. I don't—I can't see where it's marked.

The Court: Is there any objection to receiving this in evidence?

Mr. Howard: No objection, your Honor.

The Court: It is admitted.

(Respondents' Exhibit No. A-2 for identification was admitted in evidence.)

Q. (By Mr. Biele): Mr. Keezer, will you take this pencil and mark on the chart where the Eclipse mill is?

The Court: If you know.

Q. (By Mr. Biele): If you know.

The Court: Be sure to be accurate, Captain, if it is possible for you to be, and if you cannot be, let Counsel and the Court know.

(Witness marks on Respondents' Exhibit No. A-2.)

Q. (By Mr. Biele): Captain, will you describe what you have [441] just marked on the chart?

A. I marked the location of the Eclipse Lumber Company in Everett.

Q. Would you put your initials in that area that you have just marked?

(Witness marks on exhibit.)

Q. Now, Captain, can you show the Court on that chart where the Port Dock in Everett is?

A. Yes; I can.

(Testimony of Leonard Keezer.)

Q. Will you mark on that chart where the Port Dock was and label it as such?

(Witness marks on exhibit.)

Q. Can you show on that chart where it was on the night of January 10, 1957, where it was that you picked up the scows Eclipse 15 and 25?

(Witness marks on exhibit.)

Q. What do you call that area, Captain?

A. We call it West Cove.

Q. Would you mark on the chart——

The Court: May I interrupt you?

Mr. Biele: Yes, your Honor.

The Court: What pier of the Port of Everett did you mark after marking the location of the Eclipse mill?

A. It is Pier No. 1, your Honor. They [442] call it also the Port Dock.

The Court: Port of Everett Pier No. 1, is that right?

A. Yes, your Honor.

The Court: Then this last question, may I have that read, Mr. Reporter?

(The reporter read Mr. Biele's question and the answer as follows:

("Q. What do you call that area, Captain?

("A. We call it West Cove.")

The Court: What area, Captain Keezer, were you referring to in your last answer? What area

(Testimony of Leonard Keezer.)

is that? Use words to describe its location. Where is it with reference to the location of the Eclipse mill and Everett Port Pier No. 1?

A. Your Honor, it's about a thousand feet from Pier 1.

The Court: Which way, upriver or downriver?

A. It's pretty near north.

The Court: I do not have in this instance the cardinal directions. Is it upriver or downriver?

A. It's not in the river at all, your Honor. It's formed by the naval shipyard there and there's this body of water inside that fill that forms the shipyard.

The Court: How far is it from Highway 99 and [443] the bridge on Highway 99 where it crosses the Snohomish River?

A. It would be between two and three miles from there.

The Court: Which way, upstream or downstream?

A. Upstream.

The Court: Is it farther upstream than the location of the Eclipse mill?

A. No, your Honor. This West Cove we refer to is right in Everett harbor, right close thereby.

The Court: I do not understand its location. I would like him to locate it with reference to the course of that river, the Snohomish River, as it makes the course on the ground or between its banks between the Eclipse mill and the bridge on Highway 99.

(Testimony of Leonard Keezer.)

Q. (By Mr. Biele): Captain Keezer, is the West Cove on the Snohomish River?

A. No; it isn't.

Q. Is it anywheres near Highway 99?

A. No; it isn't.

Q. Do you think you could show his Honor where Highway——

The Court: I am not interested in it if it is not—you can wholly disregard the Court's inquiry and suggestion. I thought we were talking about places that were pertinent to this accident which occurred, as [444] I understand it, at or about the premises of the Eclipse mill at Pier 1, but if it occurred out in the open Puget Sound or Everett harbor around on the face of the northerly land-fall of Everett harbor, then this question is of no interest and you may wholly disregard it.

Mr. Biele: Thank you, your Honor.

Q. (By Mr. Biele): Captain, have you marked on the chart where the West Cove is?

A. I have marked a dotted line from where I took the scows in West Cove over to Pier 1.

Q. Would you——

The Court: Who brought them to West Cove, do you know?

A. Your Honor, I don't remember what boats brought them out of the river, but I——

The Court: West Cove was a storage ground, that is what it was, for these barges, was it not, these scows?

A. Yes, your Honor.

(Testimony of Leonard Keezer.)

The Court: How far is it from that place to the river wharves of the Eclipse Lumber Company, if you know?

A. Approximately seven miles, your Honor.

The Court: Then the location of the Eclipse mill and the location of this accident and the pier at [445] which the moored vessel was tied up have no relationship whatsoever in the action of the water or in the events connected with this accident; is that true or not?

A. It's true, yes. I don't see where it would have anything to do with it, your Honor.

The Court: Then you may wholly disregard once and for all the Court's formerly manifested interest in the location of the Eclipse mill.

Q. (By Mr. Biele): Captain, would you just label the area that you have described as West Cove now?

A. Label, write "West Cove" in here?

Q. Yes.

(Witness writes on Exhibit A-2.)

Q. Captain, was it at West Cove that you picked up the scows on this night?

A. Yes; it was.

Q. And was the Cotton State at the Port Dock in Everett at this time?

A. Yes; it was.

Q. Now, Captain, as we finished the other day I was asking you about the bringing alongside of the scows. Captain, where did you bring the two

(Testimony of Leonard Keezer.)

scows alongside with reference to the starboard side of the Cotton State?

A. Just under the forward part of the bridge was where we stopped them and held them. [446]

Q. And what——

The Court: Which barges or scows were abreast of the bridge, if either was?

A. The forward scow, which was Eclipse No. 25, the front end of it, the bow end of it.

Q. (By Mr. Biele): Will you state where the forward end of the No. 25 was with reference to the forward end or to the house on the Cotton State?

A. It was under the forward part of the bridge, the midship house.

Q. Captain, what kind of a landing was it that you made in bringing these scows alongside?

Mr. Howard: Objected to as repetitious.

The Court: Do you recall having asked this question of this witness prior to the present time?

Mr. Biele: No, your Honor.

The Court: Are you sure——

Mr. Howard: That very question was asked, your Honor. I have a transcript of the testimony here.

The Court: Read it, please.

Mr. Howard: Beg your pardon?

The Court: Read the question.

Mr. Biele: If it has been asked I will withdraw it, your Honor.

(Testimony of Leonard Keezer.)

The Court: Wait just a moment. We want [447] to find out.

(Brief pause—Mr. Howard searching transcript.)

The Court: I guess we will have to proceed. The question is withdrawn. Ask him another one.

Q. (By Mr. Biele): Captain, when the No. 25 was brought alongside the Cotton State, what was done, if anything, to keep the scows, the ships, from damaging each other?

A. Oh, we generally——

The Court: No, this time.

Mr. Howard: I move to strike.

The Court: This time.

A. Mr. Hafey put a piece of scrap lumber between the corner of the scow and the side of the ship, merely to keep it from scraping up their paint a little.

The Court: Did you get any impression as to what size or dimensions of that piece of scrap——

A. Oh, they're generally two by fours or two——

The Court: I wish you would not say "generally." I want to know in this instance, and if you do not know in this instance do not attempt to say so.

A. Your Honor, I think it was a two by four.

Q. (By Mr. Biele): Captain, do you know what happened to that scrap lumber? [448]

(Testimony of Leonard Keezer.)

A. It dropped into the water, I guess, after it served its purpose.

Q. Was there any damage done to the Cotton State when you brought the scow alongside?

A. No; there wasn't.

Q. Was there any paint scratched on the Cotton State? A. No; there wasn't.

Q. Captain, after you brought the scows alongside, will you state to the Court what occurred next?

A. I held the scows in position waiting to secure a line from the ship to the scow.

Q. How did you hold the scows in position?

A. By pulling dead slow and holding them in against the ship.

Q. And why was that necessary?

A. Because there was a light wind blowing aft.

Q. Did you have any occasion to push the scows back aft?

A. I didn't need to push the scows at any time, and I didn't.

The Court: Just say yes or no.

A. No, your Honor.

The Court: You should not make the other comment. Counsel has a reason for putting the question in the form he did. He may later want to ask you a question that would call for the answer you gave, but try to have in mind first to answer Counsel, then if Counsel wishes further information, he will ask you. [449]

(Testimony of Leonard Keezer.)

Q. (By Mr. Biele): Captain, was the scow secured to the Cotton State?

A. At what time?

Q. After you brought it alongside.

A. Yes; it was.

Q. And how was that done?

A. They passed a line down from the ship and it was made fast to the stanchion of the scow.

Q. What stanchion of the scow was that made fast to?

A. That would be the outboard, the starboard one on No. 25.

The Court: Which scow, the leading scow?

A. The leading scow.

Q. (By Mr. Biele): Was that the same stanchion that your towline was attached to?

A. Yes; it was.

Q. Captain, did you recognize anybody that was on deck of the Cotton State at this time?

A. No; I didn't.

Q. Were you able to see who was handling the line on the Cotton State?

A. No; I didn't—I couldn't say.

Q. Do you recall the gentleman that gave orders to you to spot the scows?

A. The man was either handling lines himself or he was right there. [450]

The Court: That is not the question that is before you at all. Strike the answer. You may invite his attention to the form of your question if you wish to, Counsel.

(Testimony of Leonard Keezer.)

Q. (By Mr. Biele): Captain, was the man that directed you to spot the scows present while the scows were—while the line was being secured?

A. Yes; he was as far as I know. Is that all right, your Honor?

The Court: You may ask him another question.

Q. (By Mr. Biele): Did you receive any protest from anyone on the Cotton State as to the manner in which the scow was being tied up?

A. No.

Q. Captain, how was the wind blowing at this time?

A. The wind was blowing generally aft.

The Court: What do you mean by that? Was it blowing in the direction from the forepeak towards the after end of the vessel or was the contrary true?

A. It was blowing from the forward end of the vessel towards the after end of the vessel, your Honor.

The Court: Is that the kind of wind you previously mentioned a stern breeze was blowing, a light stern breeze was blowing?

A. Yes, your Honor. [451]

The Court: You may proceed.

Q. (By Mr. Biele): Captain, how did that strike the scows?

A. Well, it would strike them on the forward scow.

Q. And which way would that move the scow?

A. It would move the scows aft on the ship.

(Testimony of Leonard Keezer.)

Q. Captain, was it possible to hold the scows against that wind? A. Yes; it was.

Q. Did you hold those scows against that wind?

A. Yes; I did.

Q. Now, Captain——

The Court: By what force or power did you do that, if any such was applied?

A. I worked very slowly ahead with the tug, your Honor.

The Court: With the tug?

A. I still had my towline out on the scow.

The Court: What about the tug's engines; were they then in operation, and, if so, what, if you know, was furnishing the force by which you moved in the manner that you have just described?

A. I just worked the tug's engines very slowly, enough to hold them in position, your Honor.

Q. (By Mr. Biele): Captain, in what direction did you work the tug to hold them in [452] position? A. Ahead and in towards the ship.

Q. Now, Captain, while this line was being secured, where was Mr. Hafey?

The Court: If you know.

A. He was securing the line on the scow. On the scow.

Q. (By Mr. Biele): Can you tell the Court where Mr. Anderson was?

A. He stayed on the after deck of the tug.

Q. Captain, were you satisfied that the line from the ship to the scow was secured?

A. Yes; I was.

(Testimony of Leonard Keezer.)

Q. What, if anything, occurred after the line from the ship to the scow was secured?

A. After the line was secured I had Anderson let the line go from the tug. I slacked off then.

The Court: The line from the tug to what?

A. From the tug to the scow, your Honor.

The Court: Is that the towing line?

A. That's the towing line, yes, sir.

Q. (By Mr. Biele): Thereafter, Captain, what maneuver was made by the tug?

A. I worked ahead to get away from the scow a little bit and then backed out to maneuver to go back to the other tail scow.

Q. Now, in working ahead did you push in any way against [453] the scows?

A. No; I didn't.

Q. After you worked out ahead, Captain, then what did you do?

A. I backed out and maneuvered over to get back to the tail scow.

Q. Captain, when was it, if at any time, that you became aware that the after scow was in trouble?

A. When I approached where the two scows coupled together I could see a lurching of Eclipse No. 15.

Q. How long had it been since you had cast off from the forward scow, No. 25?

A. I would say three or four minutes.

Q. What did you observe with relation to the scow No. 15?

(Testimony of Leonard Keezer.)

A. I observed a lurching of the scow, a rocking motion.

Q. Did you observe whether the scows 15 and 25 were still close coupled? A. Yes. They were.

Q. When you observed this lurching had your tug touched or contacted the No. 15 in any way?

A. I observed that while I was some distance off yet.

Q. About how far were you off from the No. 15 when you made this observation of trouble?

A. I suppose twenty-five or thirty feet.

Q. Now, when you observed this trouble, had the tug contacted [454] or touched the scow No. 15?

A. No; it hadn't.

Q. When you observed this trouble, could you state whether you saw anyone back aft on the deck of the Cotton State?

A. I didn't have reason to observe anybody, or didn't.

Q. Can you state where Mr. Hafey was when this trouble was observed by you?

A. He was standing on Eclipse No. 5 right where they were coupled to No. 15, on that end of the scow.

Q. Do you mean 25, or——

A. He was on 25.

Q. Would that be the forward scow?

A. That would be the forward scow.

Q. Captain, what did you do after you saw No. 15 lurching, in trouble?

A. It was only a very short time until Hafey

(Testimony of Leonard Keezer.)

informed me that the scow was sinking, so I immediately got into position to pull that scow out of there.

Q. Did you pull the scow out?

A. Yes; I did.

Q. Will you explain to the Court how you pulled out the scow?

A. I got the tug turned around so that the stern was in towards the scow, the stern in towards the scow and the ship, and pulled it out with the same towline, the same [455] procedure as I had pulled it in there.

Q. Captain, at the time that the scow was observed by you in trouble were there lines from the No. 15 to the No. 25? A. Yes; there were.

Q. What lines were those?

A. The coupling lines were still coupled.

Mr. Biele: Would the bailiff give this sketch, Exhibit 4, to the witness?

(The exhibit was handed to the witness.)

Q. (By Mr. Biele): Captain, do you see on that exhibit——

The Court: Is that something that the captain or some other person's freehand drawing has produced already?

Mr. Biele: That is the sketch of Captain McLaughlin, your Honor.

The Court: Is it already in evidence?

Mr. Biele: Yes, your Honor.

(Testimony of Leonard Keezer.)

The Court: You may inquire. Will you refer again to the exhibit number, please?

Mr. Biele: That is Exhibit No. 4, I think, your Honor.

The Court: Libelant's?

Mr. Biele: Libelant's Exhibit No. 4.

Q. (By Mr. Biele): Captain, do you see the dotted line with [456] the numeral 15 in that sketch? A. Yes; I do.

Q. And do you see the dotted lines forward of the number 15 and generally off the ship on the starboard side? A. Yes; I do.

Q. Now, Captain, do you see——

The Court: Counsel undoubtedly has in mind that the exhibit was received for the limited purpose of illustrating the testimony of the witness who was then on the stand.

Mr. Biele: I understand that, your Honor. I only have one point in this.

Q. (By Mr. Biele): Captain, do you see the distance between the after scow on that and the No. 15? A. Yes; I do.

Q. Will you tell the Court whether that distance is correct as the situation was when you saw the No. 15 lurching in trouble?

A. No, it isn't. It shows a space here, and, as I've stated, the scows were close coupled, right together.

Q. The space between what are you referring to, Captain?

A. Between Eclipse 15 and Eclipse 25.

(Testimony of Leonard Keezer.)

The Court: Captain, where was that stanchion on the E-25 to which you said previously in your testimony the line from the Cotton State was tied? Where was [457] it located on that scow? Was it forward, aft, or to one side or the other? If so, which one of these, which one or ones of these?

A. It was forward on the outboard side, your Honor.

The Court: Outboard was on the starboard side of the scow as it was headed into this slip?

A. Yes, your Honor.

Q. (By Mr. Biele): And what scow was that, Mr. Keezer? A. That was Eclipse 25.

The Court: That was the leading scow in this towing operation, is that right?

A. Yes; it was, your Honor.

The Court: Was that or was it not a usual place to affix the moored ship's lines to the moving scow or tug as distinguished from a stanchion or place or cleat located somewhere else on that leading scow?

A. No; that is the usual place, your Honor.

The Court: Why do you put it on the offshore forward position like that? Why not put it on the inshore forward or the inshore after line tying device?

A. Your Honor, it is put on the outside so as not only to hold the scow from going——

The Court: Away from the moored ship?

A. Away from the moored ship as well as [458] inways.

(Testimony of Leonard Keezer.)

The Court: Why are you concerned as well with it going away from the moored ship to which it is moored as you are to take caution against its moving inward too close to that ship? What is it about the operation that calls for your choice made here in this instance?

A. We used the line there because it serves the double purpose of holding the scow from going endways and also holds it in tight against the ship.

The Court: You may inquire.

Q. (By Mr. Biele): Captain, when you had taken in the tug's line following the securing of the line from the scow to the ship, were the scows drifting in any way?

A. Will you repeat that, please?

The Court: Read it, Mr. Reporter.

(The reporter read the last question.)

A. I didn't note that they were, no.

Q. (By Mr. Biele): Were you satisfied that they were tied up alongside the ship?

A. I was.

Mr. Biele: May I consult with Mr. Crutcher?

The Court: You may do that.

(Brief pause.)

Q. (By Mr. Biele): Captain, how long would you estimate it [459] took from the time the Lea Moe entered the slip until you observed that the No. 15 was in trouble?

The Court: Did he not say how long? I think

(Testimony of Leonard Keezer.)

he said that, Mr. Biele. He said three or four minutes before.

Mr. Biele: Your Honor, this is an over-all time.

Q. (By Mr. Biele): How long was it from the time that you first entered the slip until you——

A. Oh, that was about eight or ten minutes.

Q. Captain, would you tell the Court what your explanation is for this damage to Scow No. 15?

A. I believe that the scow—the line on the ship was either slacked or let go, allowing the wind to drift the scows astern.

Q. And when was that accomplished, if you know?

A. It must have been after I let go my line.

Mr. Howard: I move to strike that as something not within the knowledge of the witness.

The Court: The motion is granted. It is so ordered. The statement is stricken. The Court will disregard it. The reason the Court does so is because the witness' answer was an argumentative statement and not a statement of fact.

Mr. Biele: May I confer with Mr. Crutcher a [460] minute, your Honor?

The Court: Yes.

(Brief pause.)

Mr. Biele: That's all, your Honor.

The Court: Mr. Keezer, this may have been covered in part by the Court's questions previously but I want to have your information as to whether the beginning of this trip, this towing operation, had

(Testimony of Leonard Keezer.)

any connection with the original movement of these two scows from their original loading place at the Eclipse mill.

A. Your Honor, I don't see where that would have any——

The Court: Did you move those scows from the Eclipse mill into the storage basin from which you finally took them on this final towing operation?

A. No; I didn't, your Honor.

The Court: You had nothing to do with that. So far as you know the scows may have been put in this storage basin after being towed from the mill a week before or a day before or hours before, is that right?

A. Yes; they could have been, your Honor.

The Court: And they were picked up from this storage basin where they lay awaiting whatever ship was finally to take their cargo aboard the visiting ship, is that right? [461]

A. That's correct, your Honor.

The Court: You may proceed.

Cross-Examination

By Mr. Howard:

Q. Mr. Keezer, do you hold any license issued by the United States Coast Guard as a deck officer or engineering officer?

A. No, sir; I don't.

Q. Do I understand correctly that before you undertook to move these two scows from their posi-

(Testimony of Leonard Keezer.)

tion in West Cove to the point alongside the Cotton State you first took the tug Lea Moe out without any tow and went off the Port Dock to offer or be available for any assistance to the Cotton State in docking? A. Yes; I did.

Q. And you had nothing in tow then?

A. No; I didn't.

Q. And you stood by there while the Cotton State did approach and make a landing at the dock?

A. I didn't watch while he finished his landing. I was there while he made his approach.

Q. And when did you leave, with reference to the time the vessel made a landing at the dock?

A. I left when the pilot indicated he didn't need any [462] assistance.

The Court: Do you know how many minutes it was thereafter when he effected a landing of the Cotton State against the dock? If so, state.

A. I could only guess, your Honor.

The Court: How many feet or portions of a mile or miles did you move those two scows, the E-15 and E-25, from the place in the storage ground where you picked them up and finally released them alongside the ship which you said previously was under the ship's house of the Cotton State?

A. In the neighborhood——

The Court: Over the surface of the water how far did you move those two scows?

A. In the neighborhood of one thousand feet, your Honor.

(Testimony of Leonard Keezer.)

The Court: You may inquire.

Q. (By Mr. Howard): If I understand you correctly from your testimony last Friday, you did observe that the berthing of the Cotton State at the Port Dock No. 1 was satisfactory and expeditious; is that correct?

A. I judged that because he was already tied up when I got back with the scows, and I wasn't gone very long.

Q. Now, when you returned with the scows from West Cove to a point off the face of the Port Dock No. 1 at Everett, [463] will you state whether or not the Cotton State had completed its landing and mooring at that time?

A. I could see that the lines were out.

Q. And was the mooring completed?

A. As far as I knew it was.

Q. Then you were aware at that time that the vessel had just arrived from sea and had made a landing and tied up to the dock?

A. Yes; I was.

Q. Now, where was the stern of the Cotton State with reference to the face of the dock, the outer face of the dock?

A. I remember it to be a little inshore from the face of the dock.

Q. A little inside of the face of the dock?

A. Yes.

Q. Mr. Keezer, the tug Lea Moe, will you describe to us the pilothouse, where it is located on the ship and where you would be standing on the

(Testimony of Leonard Keezer.)

deck of the pilothouse with reference to the main deck of the tug?

A. The floor of the pilothouse is about two feet above the main deck.

Q. And how far is the main deck above the water line?

A. About three and a half, four feet.

Q. So that over-all you would be somewhere between six and seven feet above the water line as you stood in the [464] pilothouse of the tug?

A. Well, anyway that, I imagine.

Q. A foot or more one way or the other?

A. Yes.

Q. Now, is there a spotlight on the tug Lea Moe? Was there a spotlight at this time on the Lea Moe?

A. Yes; there was.

Q. And where is that spotlight located?

A. On the roof of the wheelhouse.

Q. And how is that spotlight controlled? How do you turn it? Can you turn it from your position in the pilothouse?

A. Yes; it is controlled from inside the pilothouse.

Q. Now, the two barges which you were towing on the night this accident occurred were loaded with lumber, were they not?

A. Yes; they were.

Q. To about what height above the deck of the barges?

A. I think about twelve feet.

Q. About twelve feet, and how far would the deck of the barges be above the water line?

(Testimony of Leonard Keezer.)

A. I would say about three and a half feet.

Q. So that the top of the lumber would be fifteen and a half feet or so above the water line, according to your estimate?

A. Approximately. [465]

Q. Now, from your position in the wheelhouse or pilothouse of the tug Lea Moe as you were towing these barges astern of your tug as you described, was it possible you to see the stern of the tow?

A. You would see the stern of the tow on one side, on the side that we were hooked onto.

Q. And why was that, Mr. Keezer? Why would that be so?

A. Because you could see down along that side.

Q. You were towing from one side of the tow then, is that right, really? A. Yes; I was.

Q. Was your view of the stern of the tow obstructed in any way?

A. I could not see over the lumber at some angles, no.

Q. Was it possible for you to see back toward the stern of the tow?

A. It was on the one side, yes, sir.

Q. From your position in the pilothouse?

A. Yes.

Q. Was it possible as you came up alongside the Cotton State for you to see back to the stern of the Cotton State from your position in the pilot-house?

(Testimony of Leonard Keezer.)

A. As I approached the Cotton State, I swung wide so I could see the stern.

Q. After you had made this swing and were heading in, that [466] is after the tug got inside the slip beyond or inside or inward from the stern of the vessel, were you then able to see the stern of the Cotton State from your position in the pilot-house? A. No; I couldn't.

Q. And why was that?

A. Because of the lumber.

Q. The lumber obstructed your view, did it not?

A. Yes; it did.

Q. Now, Mr. Keezer, you've been delivering barges and scows alongside vessels for many years in Everett, Washington, as I understand?

A. Yes, sir.

Q. Who provides the lines used to secure lumber barges when they are brought alongside ships?

A. The ship provides the lines.

Q. That's a customary practice, is it not?

A. Yes; it is.

Q. There was nothing unusual about the fact in this case that the ship provided the line?

A. No; there wasn't.

Q. Now, Mr. Keezer, as you towed these two scows you had your towing line extending from the tow bitts on the stern of the tug back to the forward starboard stanchion onto No. 25, is that correct? [467] A. Yes; I did.

Q. You weren't towing by a bridle arrangement

(Testimony of Leonard Keezer.)

so that you had an attachment to each corner of the forward end of the leading barge, were you?

A. No; I wasn't.

Q. Did that have the effect of causing your tow to be less maneuverable than if you had had a bridle on?

A. No; not on a short line. On a real short line, why it was very efficient that way.

Q. Then in that situation the barges in tow of the tug would not follow directly behind the tug, isn't that correct?

A. With two barges long towing in that way they followed very good.

Q. Would that mean that the tug and the two barges would be directly in line, one right behind the other?

A. Pretty much.

Q. Except that the tug would be off the forward starboard corner of the barges, isn't that correct?

A. Yes.

Q. You wouldn't be in the middle point of the forward end of the tow?

A. No; I wouldn't.

Q. Now, Mr. Keezer, from whom did you receive your orders as far as delivery of these scows was concerned?

A. I received them from the company dispatcher, the Tow Boat [468] Company dispatcher.

Q. From The Pacific Tow Boat Company dispatcher?

A. Yes.

The Court: Where is that office with respect to location?

(Testimony of Leonard Keezer.)

A. That's at 24th and Norton in Everett, your Honor.

The Court: Where is it with reference to the storage place from which your towing operation began?

A. It is right across a short stretch of water there from where the scows were tied, your Honor, before I picked them up.

Q. (By Mr. Howard): Now, Mr. Keezer, before you undertook to deliver these two scows alongside the Cotton State, had you received any orders or instructions from anybody on the Cotton State? Before you undertook to deliver these scows alongside the vessel, had you received any orders or instructions from the vessel?

A. You mean before I got to the ship?

Q. That's right. A. No; I hadn't.

Q. Your only instructions came from The Pacific Tow Boat Company?

A. Before I got to the ship, that is right.

Q. And, as I understand it, The Pacific Tow Boat Company [469] didn't tell you at which hatch the barges were to be delivered?

A. They told me that one went to number one hatch and one went to number four.

Q. Specifically, Mr. Keezer, did The Pacific Tow Boat Company tell you that the No. 25 was to go to the number one hatch or to the number four hatch?

A. They said one scow could go to the number one hatch and one could go to number four hatch.

(Testimony of Leonard Keezer.)

Mr. Howard: I move to strike that answer as not responsive to my question, your Honor.

The Court: Granted, and it is so ordered.

Q. (By Mr. Howard): Now, Mr. Keezer, my question is, as so Barge No. 25 did The Pacific Tow Boat Company indicate to you at which hatch that scow was to be delivered?

A. No; they didn't.

Q. Did The Pacific Tow Boat Company indicate to you at which hatch the No. 15 was to be delivered?

A. No; they didn't.

Q. At the time that you departed from West Cove to tow these barges, scows, up alongside the Cotton State, will you state whether or not it was dark or light at that time?

A. It was night.

Q. It was night. It was after sunset, in other words?

A. It was some time after sunset. [470]

Q. Now, as you left West Cove to deliver these barges to the Cotton State, did you have any lights or were there any lights burning on either the Barge No. 15 or the Barge No. 25?

A. No; there wasn't.

Q. Were there any lights burning on those barges or scows as you came up alongside the Cotton State?

A. No; there wasn't.

Q. What time did the tug and barges depart from West Cove?

A. Shortly after 6:00.

Q. With the barges?

A. With the barges.

(Testimony of Leonard Keezer.)

Mr. Howard: May we have the log of the tug, please?

The Clerk: Do you have the number handy?

Mr. Howard: It isn't in evidence yet. I would like to have it produced at this time. It was marked as an exhibit, your Honor, in the pretrial order.

The Court: All those connected with this case are excused for a short recess.

(Short recess.)

The Court: You may resume the interrogation.

Q. (By Mr. Howard): Mr. Keezer, you said that you departed West Cove shortly after 6:00 o'clock, around 6:00 o'clock?

A. Some time after 6:00 o'clock. [471]

Q. Well, how long after?

A. I couldn't say exactly. I wouldn't remember.

Q. 6:00 o'clock would be 1800 hours on the 24-hour clock, would it not?

A. Yes; it would.

Mr. Howard: Have we got the logbook marked now, Mr. Clerk?

The Clerk: It will be Libelant's Exhibit No. 16.

(A page from Lea Moe logbook was marked Libelant's Exhibit No. 16 for identification.)

The Court: What kind of logbook do you call that?

A. It's the logbook, the sheet is torn out, your Honor, and turned in every night.

(Testimony of Leonard Keezer.)

The Court: Is there just one logbook kept on your tug, kept where this is kept?

A. Yes, your Honor.

The Court: Is this it?

A. That's it.

The Court: And this is a page from the book itself, is that right?

A. Yes; it is, your Honor.

Q. (By Mr. Howard): Will you examine what is before you now as Exhibit 16 for [472] identification?

A. Yes, sir.

Q. Is that the page for the logbook of the tug Lea Moe for the day this accident occurred?

A. Yes; it is.

Q. And who made the entries in that logbook on that day?

A. I did.

Mr. Howard: I offer that in evidence, your Honor.

Mr. Biele: No objection.

The Court: Admitted.

(Libelant's Exhibit No. 16 for identification was admitted in evidence.)

Q. (By Mr. Howard): Now, Mr. Keezer, you may refer to that logbook to refresh your memory if you care to do so. According to the logbook, what time did you go to Pier No. 1 with the tug Lea Moe without a tow to check on the arrival of the Cotton State?

A. It must have been right around 6:00 o'clock.

(Testimony of Leonard Keezer.)

Q. Please refer to the entry at 1830 on Exhibit No. 16. Will you read that, please?

A. (Reading): "Check at Pier No. 1 to see if SS Cotton State needs help in."

Q. Does that refer to the time that you went to the Port Dock No. 1 to check on the arrival of the Cotton State? A. Yes; it does. [473]

Q. That would be 6:30 p.m.?

A. That's what it says, yes, sir.

Q. Now, what time did you leave on the second occasion when you had the barges in tow to proceed from West Cove to Port Dock No. 1?

A. It says here at 1840.

Q. Is that an accurate entry that you made in the log?

A. It don't appear to be. The log was written up some time after this accident happened.

Q. Do you mean to say that all of these entries were made up at some time after the accident?

A. Yes; they were.

Q. That refers to all of the entries in your log-book for this date? A. That is true.

Q. Why didn't you make the entries in the log-book at the time the events occurred?

A. I was too busy.

Q. Do you mean between 6:00 o'clock when the first entry occurs and 1840 when you have an entry that you took the scows from the craneways to deliver them alongside the Cotton State that you had no time to make any entry, is that correct?

A. No; that's not correct.

(Testimony of Leonard Keezer.)

Q. Were you short handed on the tug? [474]

A. No, we weren't.

Q. But you were so busy you couldn't make log entries?

A. We often write up our log later. We don't attempt to keep it right up to the minute.

Q. I see. Then these times in the log don't really mean anything, do they?

A. They don't mean very much in this case; it was written up afterwards.

Q. I see. Now, Mr. Keezer, what would you state to be the time that you arrived alongside the Cotton State with the barges in tow, where you had the leading barge, No. 25, at the point that you described where the forward end would be below the bridge?

A. I could only guess.

Q. What is your best estimate of that time?

A. It would be shortly after 6:00 o'clock?

Q. Shortly after 6:00 o'clock you had the barges alongside the ship, is that correct?

A. Yes.

Q. What is your best estimate of the time that the ship arrived at the dock and moored at the dock with the lines secured?

A. It must have been right around 1800 or 6:00 o'clock.

Q. Right around 1800. Now, what is your best estimate of the time that the accident [475] occurred?

A. I would say about 12 to 15 minutes after 6:00.

(Testimony of Leonard Keezer.)

Q. That would be about 6:15, 6:12 to 6:15 p.m.?

A. Yes.

Q. And in terms of a 24-hour clock, that would be about 1812 to 1815? A. Yes.

Q. Mr. Keezer, as the tug was towing the barges in to the slip and as the tug was off the face of the dock, did you use your spotlight at all to determine what the conditions were around the stern of the ship?

A. The visibility was good enough, I didn't need to use my spotlight.

Q. The answer is you did not use your spotlight?

A. I didn't, no.

Q. Then you did not cast your spotlight on the rudder or the propeller of the vessel to determine what their condition was?

A. No, I didn't.

Q. Now, as you continued on in to tow your barges into the position alongside the ship did you yourself have any conversation personally, that is between you and anyone on the deck of the Cotton State? A. No, I didn't.

Q. Were you able at any time as you came in alongside the ship with the barges to recognize anybody on the deck of [476] the ship?

A. No, I wasn't.

Q. Did you at any time, Mr. Keezer, report to anyone on the ship as to how many barges you had in tow or the length of the barges?

A. No, I didn't.

Q. Did you hear any of your crew make any

(Testimony of Leonard Keezer.)

report to anyone on the ship as to the length of the barges that you had in tow?

A. No, I didn't.

The Court: Repeat in this connection how long they were, each one of those two scows.

A. They were about 110 feet each, your Honor.

Q. (By Mr. Howard): As a matter of fact they are 110.4 feet in length each, are they not?

A. I didn't know about the four-tenths, no.

The Court: They are each about how much did you say?

A. 110 feet each, your Honor.

Mr. Howard: According to the admitted facts in the pretrial order, your Honor, each barge is 110.4 feet in length.

Q. (By Mr. Howard): Now then, Captain, or Mr. Keezer, the total length, the cumulative length of the two barges in the tow would be 220 feet, would it not? [477]

A. Yes, that is right.

Q. Plus the distance that you have described between the two barges where they were close coupled together, is that correct?

A. That would be correct.

Q. So that the total length of your tow, that is of the two barges, from the forward end of the leading barge to the after end of the trailing barge, would be something in excess of 220 feet?

A. Very little over 220 feet.

Q. A little over. Did you know as you came alongside the vessel what the distance was from the point below the bridge pilot house back to

(Testimony of Leonard Keezer.)

the after end of the vessel around the stern, around the rudder or the propeller?

A. I did not know exactly, no.

The Court: Do you know now?

A. No.

Q. (By Mr. Howard): Mr. Keezer, did you make a determination in your own mind or yourself as to where the trailing end of your tow would be with reference to the stern of the ship as you came alongside? A. Yes, I did.

Q. And what determination did you make in that connection?

A. I determined that I was far enough forward to clear, and [478] I held the scows into the ship so that they couldn't have got under the counter anyway.

Q. How did you make that determination, Mr. Keezer? Specifically, were you able to see the stern end of the tow with relation to the stern of the vessel as you came up alongside?

A. I couldn't see the stern of the vessel, no.

Q. So you made that determination without being able to see, is that correct?

A. I made it on judging from how far the scows extended on other ships like that.

Q. I see. I take it then, Mr. Keezer, that you used your own judgment in determining where the stern of your tow would be with respect to the stern of the vessel.

A. I stopped the scows where the man indicated, but I judged it would be plenty of clearance.

(Testimony of Leonard Keezer.)

Mr. Howard I move to strike that answer as not responsive.

The Court: It is stricken and the Court will disregard it.

Q. (By Mr. Howard): I take it, Mr. Keezer, that you made your own determination, used your own judgment, in determining where the after end of the tow would be with reference to the stern of the vessel? A. Yes. [479]

Q. In making that determination did you have anybody from your tug stationed on the after scow, No. 15, to report to you as to where the trailing end or the after end of the barge would be with reference to the stern of the vessel?

A. Hafey was on the corner of the scow towards the ship, and he could look back along the scows, but he wasn't back there.

Q. Hafey was on the corner of which scow?

A. Of the leading scow.

Q. Of the leading scow?

A. On the corner.

Q. My question, Mr. Keezer, was whether you had anybody from the tug or was there anybody on the barge, the trailing barge, to report to you as to where the after end of that trailing barge would be with reference to the stern of the vessel.

A. No, there was nobody on the trailing barge.

The Court: Was there anybody on it anywhere, not only at the stern but anywhere on the trailing barge?

(Testimony of Leonard Keezer.)

A. No, there wasn't, your Honor.

The Court: You may inquire.

Q. (By Mr. Howard): Did you get any reports from anyone on the barges as to where the after end of the barge would be with reference to the stern of the vessel? [480]

A. No, I didn't.

Q. I take it then that you made this determination by your own calculation as to where the trailing end of Barge 15 would be.

A. Yes, I did.

Q. Now, Mr. Keezer, did you communicate with anybody on the Cotton State with reference to this calculation that you made as to where your barges would lie alongside the Cotton State?

A. I communicated with the authority on deck through Mr. Hafey.

Q. Through Mr. Hafey? A. Yes, sir.

Q. Did you at any time directly or through Mr. Hafey advise the persons on the Cotton State as to where Barge 15 would come alongside the vessel, with reference to the stern of the vessel?

A. No, I didn't.

Q. Do you know now, Mr. Keezer, what the distance is from the forward end of the midship house on the Cotton State to a point astern or just aft of the propeller on the Cotton State?

A. No, I don't.

Mr. Howard: May the witness have before him, please, Libellant's Exhibit No. 5? [481]

(The exhibit was placed before the witness.)

(Testimony of Leonard Keezer.)

Q. (By Mr. Howard): May I ask you, Mr. Keezer, to describe where you found the damage to be on the Barge No. 15, with reference to the side and the forward or after end of the scow?

A. The barge went down so fast I didn't have any opportunity to see any damage.

Q. You can't say where the damage was?

A. I couldn't say, no.

Q. Now, Mr. Keezer, do you remember when your deposition was taken at Everett, Washington, for discovery purposes on September 26, 1958, in the office of The Pacific Tow Boat Company? Do you recall that occasion? A. Yes, I do.

Q. And do you recall that on that occasion you were asked questions by me concerning this accident? A. Yes, I do.

Mr. Howard: Referring to page 47 of the discovery deposition.

Q. Do you recall this question having been asked and this answer having been given by you, line 23:

“Q. Now, can you describe for us where the damage was sustained on the E-15 with reference to the forward or after end of [482] the barge as it was being towed on that night?

“A. Well, it was the after end.”

Question, top of page 48:

“Q. It would be the after port side—the after port quarter, is that correct? A. Yes.”

Do you recall those questions having been asked and your having given those answers?

(Testimony of Leonard Keezer.)

Mr. Biele: Your Honor, may this be continued to the next question and answer?

The Court: The objection and request are overruled and denied. What page are you reading from?

Mr. Howard: Page 47 and continuing to page 48, your Honor.

Q. (By Mr. Howard): Do you recall those questions having been asked and those answers having been given by you? A. Yes, I do.

Q. And are those correct statements?

A. Some of the things that appear in that disposition I wouldn't say are correct.

Q. I'm not referring to the deposition, some of it, I'm referring to these questions and answers, Mr. Keezer. Was this a correct answer that you gave to the question?

A. It was correct to the best of my knowledge, yes. [483]

Q. So that the damage was at the after end on the port side or port quarter of the barge E-15?

A. Yes.

Q. Now you have before you I believe, Mr. Keezer, Libelant's Exhibit No. 5. Will you please mark on there with an "LK" the point where you testify the leading end of barge No. 25 came up against the side of the Cotton State, using a red pencil, and mark that with an arrow and an "LK," please.

(Witness marks on exhibit.)

Q. Now will you also mark on that Libelant's Exhibit No. 5 the point on the ship, the Cotton

(Testimony of Leonard Keezer.)

State, from which the line was passed to the deck hand of the tug who was on the forward end of barge No. 25.

(Witness marks on exhibit.)

A. Initials, too?

Q. Yes. Put "LK-1" to distinguish that.

(Witness writes on exhibit.)

Mr. Howard: I would like to see that, your Honor, if I may.

The Court: You may do that.

(Mr. Howard examined the exhibit.)

Mr. Biele: May I see it?

The Court: Let opposing counsel see it.

(Mr. Biele and Mr. Crutcher examined the exhibit, after which it was returned to the witness.) [484]

Q. (By Mr. Howard): Now, Mr. Keezer, will you state whether or not Point LK as you have marked it on Exhibit No. 5 does or does not represent the point at which the leading edge of the barge was brought to rest stationary against the side of the ship as the line was secured that you have described? Does that represent the position?

A. That represents it, yes.

The Court: Was any timber between the leading barge and the side of the moored ship Cotton State?

A. No, none, your Honor.

Q. (By Mr. Howard): Mr. Keezer, do you see

(Testimony of Leonard Keezer.)

below the outline of the ship on Libelant's Exhibit 5 the measurements in terms of distance from that approximate point back to the stern of the ship?

A. Yes, I do.

Q. Would you be good enough, please, to take a pencil and paper and add those up and determine what the distance is back to the propeller of the vessel.

(Witness computing.)

Q. Please let me know when you're through, Mr. Keezer.

A. I get 212 feet, but that's not where the scow was fastened. I can't figure how much of this next dimension here would be included.

Q. By looking at the measurements below there can you give us an approximation, whether it be in terms of five, ten, [485] fifteen feet?

A. Well, I would think another fifteen feet.

Q. Another fifteen feet? A. Yes.

Q. From that point? A. Yes.

Q. Now, if you added fifteen feet onto that what would you get, Mr. Keezer? A. 227.

Q. That includes the distance to a point aft or astern of the propeller, does it not?

A. Very little aft according to the diagram.

The Court: Starting where?

A. Starting from the bridge to the after part of the propeller.

The Court: The after side of the bridge, the middle of the bridge——

(Testimony of Leonard Keezer.)

A. The forward part of the bridge, your Honor.

The Court: That is the length of the vessel back to the stern end from the starting point you have just mentioned, is that right or wrong?

A. Yes, that's right, your Honor.

The Court: How many feet?

A. 227, your Honor.

The Court: You may proceed. [486]

Q. (By Mr. Howard): And that covers a point beyond the propeller back to the rudder, is that correct? A. Yes.

Q. So that the point to the propeller would be something a little less than 227 feet, would it not?

A. Yes, I suppose it would be a little less.

Q. Yes. Now, Mr. Keezer, after you had this one line secured by your deck hand, Mr. Hafey, from the forward outboard stanchion on the No. 25 to a point on the Cotton State, were there any other lines secured between either the barge 15 or the barge 25 and the Cotton State to your knowledge?

A. No, there wasn't to my knowledge, no.

Q. Was it your intention to leave barge 25 at that point?

A. Yes, it was—to leave it later, you mean?

Q. To leave it at that point.

A. Temporarily.

Q. Temporarily? A. Yes.

Q. You hadn't completed your delivery of barge 25 to the Cotton State, had you?

A. No, I hadn't.

(Testimony of Leonard Keezer.)

Q. You intended to move it to another position later on?

A. I intended to move it farther aft after I had gotten No. 15 out of the way. [487]

Q. Did you intend to leave No. 15 at the point where it was laying along the after section and under the stern counter of the vessel?

A. No, I didn't.

Q. What was your intention with respect to No. 15?

A. To move it around to number one hatch.

Q. So you hadn't completed your delivery of No. 15 to the vessel either, had you?

A. No, I hadn't.

Q. In delivering barges to a vessel you secure them with more than one line, don't you, Mr. Keezer?

A. Yes.

Q. And you only had one line securing two barges at that time, is that correct?

A. That's correct.

The Court: Who determines how many lines you have at that place at such a time?

A. The ship.

The Court: The ship. The tug has nothing to do with that?

A. They put the lines down from the ship, your Honor, and they always have one on each end.

The Court: You may inquire.

Q. (By Mr. Howard): And you didn't have any lines at either end of the No. 15 attached to the Cotton State, did you? [488]

(Testimony of Leonard Keezer.)

A. No, I wouldn't—

The Court: Do not make statements alone. Use words or additional words needed to show on the record that it is a question being asked.

Q. (By Mr. Howard): Well, did you have any lines from the No. 15 either fore or aft to the Cotton State before this accident occurred?

A. No.

Q. Mr. Keezer, before this accident happened on January 10, 1957, were you aware of the fact that vessels such as the Cotton State when they arrived at a dock from sea would continue to turn their propellers either in forward rotation or aft rotation slowly for a period of time?

A. I was aware that some do.

Q. You were aware that some do?

A. That some do, yes.

Q. And for what reason?

A. I found out afterwards to cool their turbines.

Q. But you were aware that it was the practice of some vessels to do that?

A. I was aware that some—

Q. Before the accident occurred.

A. I was aware that some do and some don't, but I wasn't—I didn't have enough knowledge of it to know exactly which ones did and which ones didn't. [489]

Q. But you did know that some of them did?

A. Yes.

Q. Did you know at that time why they did it?

(Testimony of Leonard Keezer.)

A. No, I didn't.

The Court: Was it your intention before completing your tug's operation alongside the Cotton State to cut the E-15 loose from its following position in the tow and put it up opposite the number one hold or hatch of the Cotton State ahead of and in front of, taken from the standpoint of the forward end of the Cotton State, the formerly leading scow 25? Was that part of your work which you were engaged in or intended to be engaged in before your towing operation was completed?

A. Yes, it was, your Honor, that was my intention.

The Court: At the time you saw what you now interpret as the motion results following by the E-15 of the Cotton State's propeller when you said it was lurching and rocking, I believe, were you then in a movement of the tug intended to tie up again but this time with E-15 for the purpose of moving it out from the position where it then was to a position forward of the formerly leading barge E-25 to a position near number one hatch or hold of the Cotton State? [490]

A. That was my intention, your Honor, yes.

The Court: You may inquire.

Q. (By Mr. Howard): At the time you saw the No. 15 surging and rocking as you have described it you intended to attach your towline to the No. 15 and move it out? A. Yes.

Q. And at that time there were no mooring lines secured between the 15 and the Cotton State?

(Testimony of Leonard Keezer.)

A. No, there wasn't.

Q. The coupling lines between the No. 25 and the No. 15 were still secured then?

A. Yes, they were.

Q. And that was all that secured the No. 15 in place at that time? A. Yes, it was.

Q. Now, Mr. Keezer, from your position on the outer side, the outboard side of the barges where you made this observation, were you able to see along the after deck of the Cotton State?

A. I was able to see up above, yes.

Q. Up above? A. Yes.

Q. Could you see the main deck level?

A. Yes, I could.

Q. Over the top of the lumber? [491]

A. I think the stern of the ship was high enough so I could see it from the position I was in, if I wasn't right in the middle of the scow.

Q. Could you see below the main deck level?

A. Yes. You see, in the end of these scows where the two ends were together you would have quite a space where there wasn't any lumber.

Q. And where would that be with reference to the after deck of the Cotton State?

A. I could only guess, but I believe it would be between four and five hatch, something like that.

Q. And where would that put the after end of Barge No. 15?

A. At the time I got back there are you talking about?

(Testimony of Leonard Keezer.)

Q. Yes, when you made your observation of Barge 15 surging and rocking.

A. Well, it was pretty well aft.

Q. Was it in under the stern counter of the Cotton State? A. Yes, it was.

Q. Could you see under the stern counter of the Cotton State at that time to determine whether the propeller was rotating or turning?

A. No, I couldn't.

Q. Could you determine the position of the rudder at that time? A. No, I couldn't. [492]

Q. Now, at any time before you made this observation of the No. 15 surging and rocking had you checked to determine whether the propeller of the Cotton State was turning?

A. They generally have lights out when they're turning, so I didn't check.

Q. I beg your pardon?

A. I didn't check because I didn't see the lights when I came in.

Q. Had you asked anyone on the Cotton State whether the propeller was being turned?

A. No, I hadn't.

Q. In your testimony in answer to questions by Mr. Biele on Friday you indicated that someone on the Cotton State told you or told Mr. Hafey to put the line down at the forward end of the midship house. Did you hear that conversation yourself?

A. I didn't hear the conversation, no.

(Testimony of Leonard Keezer.)

Q. So you were not testifying to any conversation that you heard yourself?

A. I was testifying to where I seen him put the line down.

Q. Not to any conversation? A. No.

Q. Do you know of your own knowledge, Mr. Keezer, whether the barges moved at all in either direction, either forward or aft, alongside the ship after the line was [493] secured between the Cotton State and the forward end of Barge No. 25? Do you know that of your own knowledge?

A. I know that they moved—they were back farther later and we never move them, that one.

Q. Now let's pin this down as to time. When later did you find them further back?

A. After we had pulled the sunken scow, sinking or sunken scow out of there and in towards the beach.

Q. How long after the accident did you determine that one or the other of the barges had been moved?

A. It was farther back aft than we left it.

Q. Yes, and how long after the accident was that?

A. Oh, that might have been 45 minutes.

Q. 45 minutes or so. Were they loading or discharging lumber—were they loading lumber from the barge to the ship at that time?

A. I couldn't say.

Q. Is it possible that they were loading lumber at that time?

(Testimony of Leonard Keezer.)

A. It was in position where it was supposed to go at number four hatch.

Q. Up to the time that the accident occurred or up to the time when you observed No. 15 surging and rocking had you made any observation of your own personal observation as to whether the barges had moved forward or aft alongside [494] the ship?

A. No, I hadn't.

Mr. Howard: That's all I have.

The Court: Any further questions, Mr. Biele?

Redirect Examination

By Mr. Biele:

Q. Captain Keezer, when you were examined at Everett by Mr. Howard and he read you some questions and answers before, I'll ask you if you also gave this answer following the last question that Mr. Howard read:

"Q. How far from the after end?

"A. Well, I wouldn't have much way of knowing that. That scow went down real fast, and I don't know."

Do you recall giving that answer? A. Yes.

Q. Captain, will you refer to Exhibit 5, which is the capacity plan of the ship.

A. This is it.

Q. Captain, can you tell from that plan how wide the Cotton State is?

A. Not this top one.

Q. Can you tell from one of the other plans?

(Testimony of Leonard Keezer.)

Mr. Biele: Counsel, may it be agreed that [495] the pretrial order indicates that the vessel is 63 feet wide?

Mr. Howard: I will check that, Mr. Biele. I think you're right on it. Just a second, please.

(Brief pause.)

Mr. Howard: 63.1 feet.

Q. (By Mr. Biele): Now, Captain, when you brought the scows alongside were you aware that the propeller was substantially less than the width of the vessel? A. Yes, I was.

Q. Do you have any idea of approximately how far inboard the propeller was from the starboard side of the Cotton State?

A. It would be some distance in.

Q. Could you tell the Court approximately how far in it would be?

A. I would say ten, twelve feet.

Q. Captain, are you aware that the diameter of the propeller was 19 feet 6 inches?

A. Well, not before this happened, no.

Q. Well, if the diameter of the propeller was 19 feet 6 inches, how far in from the side of the vessel would the propeller be?

A. What did you say the width was?

Q. If the diameter of the propeller was 19 feet 6 inches, [496] that would put half of the propeller on one side of the ship and half on the other, would it not? A. Yes, it would.

(Testimony of Leonard Keezer.)

Q. How much of the propeller would be on the starboard side of the ship?

A. That would be nine and a half feet.

Q. What would be one-half of the width of the ship?

A. It would be something over 30 feet, a little over 30 feet.

Q. What would be the dimension inboard from the starboard side of the ship to the propeller?

A. It would be nine and a half from 30.

Q. And what would that come to?

A. It would be over 20 feet.

Q. Captain, as you brought the scows alongside on this night how did the scows trail with reference to the fore and aft line of the Cotton State? What I'm seeking to determine is whether the scows were parallel to the ship when they were landed alongside.

A. They were roughly parallel; a slight angle.

Q. At what angle were they to the ship?

A. A slight angle away from the ship.

Q. How far from the stern of the ship, or how far from the propeller of the ship would be the inboard distance from the inside or the port side of the scow to the propeller?

A. When the scow first was—the head end of the scow was [497] first——

Q. When the scows were secured.

A. They were laying out from the stern. They couldn't get under the counter in that position.

(Testimony of Leonard Keezer.)

Q. How far did the scow have to go inboard to get to the propeller?

A. I would judge around twenty feet.

The Court: Inboard of what?

A. They would have to pivot that much, your Honor, to get under the stern.

Q. (By Mr. Biele): Captain, how would they pivot to get under the stern?

A. The only way they could pivot is if there was slack let out on that line.

Q. What line are you referring to?

A. On the starboard or forward end of No. 25.

Q. Now, as the scows were tied up on this night with that line on the starboard side, would it have been possible for the scows to have gotten inboard into the propeller if that line had been secured in the way you saw it? A. No, it wouldn't.

Q. Now, Captain, what would be the effect if the line was not held?

A. The scows could pivot if the line was not held, as well as going backwards. [498]

Q. And how would the pivoting affect the disposition of the scows?

A. If the scows could pivot they could get in under the counter of the ship and into the propeller.

Q. Captain, could the No. 15 pivot from the No. 25 with the lines close coupled as you have described them to us?

A. No. The scows were made up real close coupled that way so as to be one unit.

(Testimony of Leonard Keezer.)

Q. Captain, were those scows pivoted with the stern end when you took aboard the line from the starboard stanchion of the tug, or the No. 25 to the tug?

A. No, they weren't. They were tight up against the ship there where the line was made fast.

Q. Captain, did you have any trouble seeing on this night? A. No, I didn't.

Mr. Biele: May I confer with Mr. Crutcher, your Honor?

The Court: Yes, you may.

(Brief pause.)

Q. (By Mr. Biele): Captain, is a Coast Guard license required for your job on the tug Lea Moe?

A. No, it isn't.

Q. Captain, the crew that you had on the Lea Moe consisted of yourself and two men, did it not?

A. Yes, it did. [499]

Q. Was that the normal crew that you carried in making a shift in and around Everett harbor such as this? A. Yes, it is.

Mr. Biele: I have no further questions, your Honor.

The Court: Anything further?

Recross-Examination

By Mr. Howard:

Q. Captain, you did have a little trouble seeing the stern of the tow on that night as you came up alongside the ship, didn't you?

(Testimony of Leonard Keezer.)

A. No, the visibility was good.

Q. But your view was obstructed by the barges and the lumber on the barges, wasn't it?

A. When I was approaching the ship and going by the stern the visibility was good.

Q. As you were going by the stern, but after you got past the stern into the slip your barges were then between you and the stern of the ship, were they not? A. Yes, they were.

Q. And with the load of lumber on those barges you could not see the stern of the ship, could you?

A. Yes, that is true.

Q. And you had no lookout on the after scow, did you? [500] A. No, we didn't.

Mr. Howard: That's all.

Mr. Biele: May I ask another question, your Honor?

The Court: You may. That will give opposing counsel a chance to ask another one, too.

Mr. Biele: Certainly.

The Court: He asked the last one.

Mr. Biele: Certainly, your Honor.

Redirect Examination

By Mr. Biele:

Q. Captain, when you came alongside the Cotton State were you told that one blade of the propeller had fourteen inches missing on it?

Mr. Howard: We'll object to that as not being proper redirect examination, your Honor.

The Court: The objection is sustained.

(Testimony of Leonard Keezer.)

Q. (By Mr. Biele): Captain, one other point. When you spotted the scows along the forward end of the bridge were you acting under orders from anyone?

Mr. Howard: Objected to as not proper redirect.

The Court: Sustained. You were going to ask just one question, you know, anyway.

Mr. Biele: That's all, your Honor. [501]

The Court: The witness is excused and may step down.

(Witness excused.)

The Court: At this time we will take a recess until after noon at 2:00 o'clock. All those connected with this case are excused until 2:00 o'clock this afternoon and may now retire.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m.)

December 2, 1958—2:00 o'Clock P.M.

(All parties present as before.)

The Court: You may proceed with the case on trial.

Mr. Crutcher: Your Honor, at this time the respondents and claimants would like to call Mr. Stuchell.

The Court: Will Mr. Stuchell come forward. There was one person by that name called already.

Mr. Crutcher: Yes, your Honor. This is Mr. Ed Stuchell. [502]

EDWIN W. STUCHELL

called as a witness in behalf of respondents-claimants, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name to the Court, Mr. Stuchell?

A. Edwin W. Stuchell.

Q. Where do you live, Mr. Stuchell?

A. Everett, Washington.

Q. And what is your occupation?

A. The lumber business.

Q. Are you a partner in the firm doing business as Eclipse Lumber Company in Everett?

A. I am.

Q. What is your position in that company?

A. General manager.

Q. How long have you been engaged in that business, Mr. Stuchell?

A. Since 1919.

Q. What was your position in the company in January of 1957?

A. General manager.

Q. Do you maintain your office at the company's mill in Everett?

A. I do. [503]

Mr. Crutcher: I ask the bailiff to hand to the witness Respondents' Exhibit A-2.

(The exhibit was handed to the witness.)

Q. (By Mr. Crutcher): Will you please refer to Respondents' Exhibit A-2 and not the position

(Testimony of Edwin W. Stuchell.)

of the Eclipse Lumber Company if it is shown on that chart or map? A. Yes, sir, that's right.

Q. Has that already been marked with a spot and some initials, Mr. Stuchell?

A. Yes, it has.

Q. There is no further need to refer to that, Mr. Stuchell. In connection with your business, Mr. Stuchell, do you own or charter scows or lighters?

A. Occasionally, in case of a large volume of—well, it hasn't been for years. We might charter lighters, but as a general rule we use our own lighters.

Q. And does your firm have a fleet of lighters?

A. We have four lighters.

Q. Are those used for the transportation of the lumber from your mill? A. Lumber, yes.

Q. To speak of those lighters for just a moment, Mr. Stuchell, is that a customary type of lighter?

A. That's a regular lumber carrier lighter.

The Court: What type? It has not been [504] described.

A. Wooden.

The Court: Mr. Crutcher.

Mr. Crutcher: Yes.

Q. (By Mr. Crutcher): Mr. Stuchell, would you describe to the Court just generally what type of lighters these are?

A. They are constructed out of wood. I think they are—they are 8 by 38 by 110 and they are rated when new 300 ton.

(Testimony of Edwin W. Stuchell.)

Q. Have those lighters been in use in Everett and in the Puget Sound area for very long?

A. They've been used I'd say since about 1929.

The Court: The question and the answer are not exactly clear. Does each of them refer to these specific ones that are involved here in this lawsuit?

Mr. Crucher: Well, your Honor, I was coming to that now.

Q. (By Mr. Crutcher): Are you familiar with the barge Eclipse 15, or the scow, excuse me——

The Court: May I interrupt you. Was your last answer with reference to any and every one of the barges operating in Everett or was it with reference to these two barges, E-25 and E-15, as to being this size and used in this manner?

A. No, all four barges, Judge, are exactly [505] the same size.

The Court: Pardon?

A. All four barges are the same size.

The Court: Are they like other barges used for similar purposes in and about the harbor of Everett?

A. Yes, sir.

The Court: You may proceed now. The Court has the information it desired.

Mr. Crutcher: Thank you, your Honor.

Q. (By Mr. Crutcher): What function does Eclipse Lumber Company perform so far as the loading of these lighters is concerned, Mr. Stuchell?

A. We load the lighters according to the ships' instructions.

(Testimony of Edwin W. Stuchell.)

Q. And after they are loaded who handles them?

A. Pacific Tow Boat Company.

Q. Have you had a long time arrangement with Pacific Tow Boat Company?

A. Pacific Tow Boat Company have handled our logs as well as our lighter handling since, well, I'd say it goes back to the time of—I'd say it goes clear back to 1904.

Q. Is there any written contract between the two companies regarding that?

A. No contract whatsoever.

Q. Is there any connection between Pacific Tow Boat Company [506] and Eclipse Lumber Company, that is——

A. None.

Q. Do they do all your towing?

A. I would say they did 85 per cent of our towing. They do all of our lighter towing and about 85 per cent of our log towing.

Q. Do you have any persons who are employed to work on board the lighters as a crew?

A. We have a regular loading crew at the mill.

Q. Well, I mean while they are in navigation.

A. None whatsoever.

Q. Is there any machinery on board these scows?

A. None.

Q. Are there any permanent light installations on these scows?

A. None.

Q. Does Eclipse have anything to do with the way in which these scows are managed after they leave the premises of the mill?

A. None whatsoever.

(Testimony of Edwin W. Stuchell.)

Q. Does Eclipse have anything to do with the loading procedure at a ship after these scows have been lightered to a ship?

A. None whatsoever.

Q. Did any of your personnel have anything to do with the [507] loading of lumber on board the Cotton State from the scows Eclipse 15 and 25?

A. None.

Mr. Crutcher: I have no other questions, your Honor.

The Court: You may inquire.

Cross-Examination

By Mr. Howard:

Q. Mr. Stuchell, are Scows E-15 and E-25 owned by the Eclipse Lumber Company?

A. They are, sir.

Q. Were they bare boat chartered to anybody in January of 1957? A. Sir?

Q. In January of 1957 were they bare boat chartered to anyone? A. Chartered?

Q. Chartered, bare boat charter.

The Court: To anyone, is that what you mean?

Q. (By Mr. Howard): To anyone.

A. No. We never charter our scows.

Q. Your company owned those two barges?

A. That's right.

Q. Do you know, Mr. Stuchell, what lights are required to [508] be carried on barges or scows when they are under way? A. No, sir.

(Testimony of Edwin W. Stuchell.)

Q. You don't know? A. No, sir.

Q. Do you know whether your barges or scows when being towed by The Pacific Tow Boat ever have lights on them?

A. Well, from just personal observation I know they put lights on, but that's no responsibility of ours.

Q. What kind of lights do they put on them, Mr. Stuchell? A. Lanterns.

Q. Lanterns. In other words, although the barges don't have any lighting generator or lighting installation of any kind they do sometimes have lanterns attached to them? A. Yes, sir.

Q. Were you aboard the Cotton State on the night that the accident occurred?

A. After the accident had occurred.

Q. You went down and went aboard after the accident occurred? A. Yes, sir.

Q. How long afterward, Mr. Stuchell?

A. I would say from 30 to 45 minutes. As soon as I got word about it I went down with my son.

Mr. Howard: I think that's all I have, your Honor. [509]

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Biele: Mr. Anderson.

Mr. Crutcher: Your Honor, may I ask that Mr. Ed Stuchell be excused as a witness?

Mr. Howard: No objection.

The Court: Mr. Stuchell is excused and may return to his own engagements if that is his wish.

JOHNNY A. ANDERSON

called as a witness in behalf of respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Biele:

Q. Mr. Anderson, will you state your full name?

A. Johnny A. Anderson.

The Court: I did not quite get the first name.

A. Johnny. Johnny A. Anderson.

The Court: Do you spell it J-o-h-n-n-y?

A. Yes, your Honor.

The Court: And the middle initial?

A. A.

The Court: How do you spell Anderson?

A. A-n-d-e-r-s-o-n. [510]

The Court: You may inquire.

Q. (By Mr. Biele): What is your address, Mr. Anderson?

A. 74 Rainier Drive.

Q. Where is that?

A. Everett, Washington.

Q. Are you married?

A. Yes, sir.

Q. How old are you?

A. Twenty-five.

Q. What is your employment, Mr. Anderson?

A. Deck hand for Pacific Tow Boat Company.

Q. How long have you been a deck hand for Pacific Tow Boat Company?

A. Since 1952.

Q. Have you been a deck hand continuously since that time?

A. No.

(Testimony of Johnny A. Anderson.)

Q. What interruption did you have?

A. I was off in '57.

Q. When were you off?

A. From November till—from November of '57 till August of '58.

Q. What was the occasion for that?

A. A layoff.

Q. Are you still employed by Pacific Tow Boat Company now? A. Yes. [511]

Q. Mr. Anderson, were you aboard the Cotton State on the night when it towed the scows from West Cove——

Mr. Howard: Counsel, you said "Cotton State." I think you meant the Lea Moe.

Mr. Biele: I misspoke myself.

Q. (By Mr. Biele): Were you aboard the tug Lea Moe when it shifted the scows from West Cove to alongside the Cotton State? A. Yes.

Q. And what was your job at that time?

A. Deck hand.

Q. Mr. Anderson, did you have anything to do with the way in which the scows were made up?

A. No.

Q. Did you have anything to do with the tying up of the scows scow to scow? A. Yes.

Q. When was that accomplished?

A. In the cove, West Cove.

Q. Now, will you tell the Court what you did to tie the scows in the cove?

A. They were lashed tightly together by lines.

Q. And how were they lashed?

(Testimony of Johnny A. Anderson.)

A. Lines wrapped around the stanchions and tied.

Q. And where were those stanchions on the scows? [512]

A. Each corner of the scow.

Q. And how far apart were those stanchions?

A. How far apart?

Q. Maybe I should put it this way: Where were those stanchions located with reference to the sides of the scows?

A. Each side on the head ends.

Q. How far inboard from each side of the scow were the stanchions? A. About a foot.

Q. Are you aware that the scows were about 38 feet wide? A. Yes.

Q. How far would that put the stanchions apart? A. From each side?

Q. Yes, from side to side?

A. Approximately 36.

Q. 36 feet, you say? A. Yes.

Q. Now, as the scows were made up how much distance, if any, was there between the two scows?

A. Not more than a foot.

The Court: Is that fore and aft or sideways or what?

A. Fore and aft.

The Court: Not more than how many feet? [513]

A. Approximately a foot.

Q. (By Mr. Biele): Did that wrapping that you have described have a purpose? A. Yes.

Q. What was it?

(Testimony of Johnny A. Anderson.)

A. To keep them tight together.

The Court: Why did you want to keep them tight together?

A. So that they would be an intricate unit, integral unit.

Mr. Howard: A what kind of unit, sir?

A. Integral unit.

The Court: Integral is what you mean, is it not?

A. Yes, your Honor.

Q. (By Mr. Biele): Mr. Anderson, were you aboard either of the scows attached to the tug that brought the two scows up past the stern area of the Cotton State? A. No.

Q. Were you on the tug? A. Yes.

Q. As you passed the Cotton State's stern area did you see a flashing red light illuminating the stern area? A. No.

Q. About how far, Mr. Anderson, would you estimate the tug [514] passed off the stern area of the Cotton State? A. At least fifty feet.

Q. Now, at the time that you passed the stern area of the Cotton State did you have any trouble with visibility? A. No.

Q. Mr. Anderson, did you have anything to do with the way in which the scow 25 was secured to the Cotton State? A. No.

Q. Do you recall observing whether that was accomplished? A. Pardon?

Q. Do you recall whether the scow 25 was tied up to the Cotton State? A. Yes.

Q. Can you state to the Court where the for-

(Testimony of Johnny A. Anderson.)

ward end of the scow was with reference to the starboard side of the steamer? A. Just——

Q. When it was tied up.

A. In line with the superstructure.

Q. What part of the superstructure?

A. The forward part.

Q. What if anything did you do while the scow No. 25 was being tied up to the Cotton State?

A. I stood on the after deck of the tug.

Q. Incidentally, who tied up the scow 25 to the Cotton State? [515] A. The other deck hand.

Q. Where was he? A. On the scow.

Q. What is his name? A. Larry Hafey.

Q. While the No. 25 was being tied up could you state to the Court what the tug was doing, if anything? A. Pulling slowly ahead.

Q. Was there a line between the tug and the scow at that time? A. Yes, sir.

Q. Where was that line?

A. On the tow bitts.

Q. You're talking about the tow bitt on the——

A. On the tug.

Q. On the tug? A. Yes.

Q. Where was this line attached to the scows?

A. On the starboard stanchion, forward stanchion, on the barge.

Q. On which scow was that? A. 25.

Q. And that was the forward scow, was it not?

A. Yes, sir.

Q. Now, Mr. Anderson, while the scow was be-

(Testimony of Johnny A. Anderson.)

ing tied up did [516] the tug have occasion or did it push the scows back in any way?

A. No, sir.

Q. Could you state to the Court why the tug was holding the scows as the line was being secured?

A. So that they wouldn't drift back.

Q. What would have caused the scows to drift back? A. The wind.

Q. Where was the wind blowing from on this occasion? A. Southerly.

Q. And how did that strike the scows?

A. Just about in the head end, the face of the scow.

Q. Where was the wind coming from in relation to the Cotton State?

A. Just about off the bow.

Q. And it was blowing in which direction, blowing toward where?

A. Northerly, or it would be west.

Q. How was it blowing in relation to the stern of the Cotton State?

A. Towards the stern.

Q. Now, did you have anything to do after the line from the Cotton State was secured to the scow? A. I handled the line on the tug.

Q. Which line was that? [517]

A. The towline.

Q. What did you do with regard to that towline?

A. After the scow was tied up I took the towline in.

Q. How was that accomplished?

(Testimony of Johnny A. Anderson.)

A. By Larry Hafey taking it off and pulling it in on deck.

Q. Did he take the line off the scow?

A. Yes.

Q. Was it passed to you then?

A. Yes.

Q. Did you take the line aboard the tug?

A. Yes.

Mr. Howard: Objected to as leading, your Honor.

The Court: Sustained.

Q. (By Mr. Biele): What did you do with the line, Captain? I mean Mr. Anderson.

A. Put it on deck.

Q. Mr. Anderson, would you state to the Court what maneuvers if any the tug made after you took the line and put it on deck, that is the towing line?

A. Maneuvered around to get ahold of the tail scow.

Q. And how did the tug do that?

A. Pulled ahead so that he could back out around.

Q. Now, during the process of pulling ahead did the tug impart any motion to either of the scows?

A. No. [518]

Q. At any time prior to the tug casting, or prior to the time you took the line aboard, did the tug have occasion to push the scows aft?

A. No.

Q. Now, where was it, Mr. Anderson, that you became aware that there was trouble on this night?

(Testimony of Johnny A. Anderson.)

A. When we were getting in position to get a line on the other scow.

Q. When you say we, whom are you referring to? A. The captain.

Q. Where was the tug in relation to the scow, the Eclipse No. 15, when you became aware of trouble? A. Outside of the scow.

Q. Was it a distance off the scow?

A. Yes.

Q. Can you state to the Court how far it was away from the scow?

A. Approximately fifteen or twenty feet.

Q. What did you observe in the manner of trouble regarding the scow 15?

A. A rocking motion.

Q. Now, when you observed that motion had the tug touched No. 15? A. No.

Q. Where was Mr. Hafey when you observed him? [519] A. He was on the scow.

Q. Which scow was that? A. The 25.

Q. Now, after you observed this rocking motion, what if anything was done by the tug with regard to that scow 15?

A. Well, the other deck hand said that the barge was in trouble——

Mr. Howard: Objected to, your Honor.

The Court: Sustained. You cannot say what he said.

Q. (By Mr. Biele): What did the tug do, Mr. Anderson, after you became aware that the scow 15 was rocking?

(Testimony of Johnny A. Anderson.)

A. We maneuvered to get a line on it.

Q. And how did you maneuver to get a line on it? A. Got the stern in.

Q. Did you have to change the tug's heading?

A. No.

Q. Now, did you have occasion to go aboard either the No. 15 or the No. 25 after you observed the rocking? A. Yes.

Q. Which scow did you go aboard?

A. 15.

Q. What was the occasion for that?

A. To let the starboard line go between the scows.

Q. Now, was that one of the lines that you had secured [520] earlier in the evening?

A. Yes.

Q. What was the condition of that line that you observed then with reference to the way it was secured earlier in the evening at West Cove?

A. It was in the same condition.

Q. Who, if anyone, cast off the other coupling line? A. The other deck hand.

Q. Now, at the time that line was cast off what was the condition of the other coupling line?

A. O.K., the same.

Q. How were the scows in relation to each other at that time? Were they still an integral unit?

A. Yes.

Q. What was done, if anything, with the scow No. 15 after you took it in tow?

A. We towed it in on the beach.

(Testimony of Johnny A. Anderson.)

Q. Where did you put it?

A. Well, just right on the beach there.

Mr. Biele: I think that's all.

Cross-Examination

By Mr. Howard:

Q. What do you mean by "an integral unit," Mr. Anderson? A. One unit. [521]

Q. One unit that was made up of two scows coupled together, is that what you mean?

A. Yes.

Q. Now, as the scows were connected together by these coupling lines at West Cove there was no strain on the coupling lines then, was there?

A. How do you mean?

Q. You weren't towing on them when the coupling lines were attached at West Cove, were you?

A. No.

Q. There was after you towed them, wasn't there, there was a strain on those lines by reason of the tug towing the two barges? A. Yes.

Q. That would have a tendency to separate the two barges, would it not, Mr. Anderson?

A. Yes.

Q. A distance of several feet, would it not?

A. Just the stretch of the line.

Q. Yes. There is a stretch in the line?

A. Yes.

Q. Now, as you came around from West Cove, Mr. Anderson, as I understand you were on the

(Testimony of Johnny A. Anderson.)

deck of the tug. A. Yes.

Q. Were you able to see over the lumber on the barge to the [522] stern of the tow, to the trailing end of Barge No. 15? A. No.

Q. What was the condition then as far as light or darkness is concerned?

A. Well, it was sunset.

Q. It was after dark, wasn't it? A. Yes.

Q. Was the tug showing its navigation lights?

A. Yes.

Q. And towing lights? A. Yes.

Q. Were there any lights burning on either one of the scows or barges? A. No.

Q. Now, as I understand, you did not see any flashing red light around the stern of the Cotton State as you passed by? A. No.

Q. Will you state whether or not the spotlight on the tug was used to cast a beam on the rudder or propeller or the stern area of the Cotton State?

A. No.

Q. There was a spotlight available on the tug?

A. Yes.

Q. As you passed the stern of the Cotton State and started [523] to enter the slip with the barges in tow did you yourself see anybody on the stern of the Cotton State? A. No.

Q. Did you hear anybody shouting or giving orders from the stern of the Cotton State?

A. Yes.

Q. From the stern of the Cotton State?

A. From on the ship.

(Testimony of Johnny A. Anderson.)

Q. Whereabouts on the ship?

A. Around the four or five hatch.

Q. Around number four or five hatch aft of the midship house? A. Yes.

Q. But you didn't see anybody on the stern of the ship? A. No.

Q. Do you remember when your deposition was taken at Everett, Washington, on September 26, 1958, Mr. Anderson? A. Yes.

Q. Questions were asked by me and you answered under oath at that time? A. Yes.

Mr. Howard, Page 7, Counsel.

Q. (By Mr. Howard): Do you remember this question being asked and these answers having been given? I'll back up a little ways starting at [524] line 6.

“Q. Did you observe whether the propeller of the Cotton State was turning as you passed off the face of the dock? A. I did not.”

The Court: What page?

Mr. Howard: Page 7, your Honor, starting at Line 6.

Mr. Biele: Your Honor, I object to that. He is talking about whether there were persons on the deck of the stern or not, and the question and the answer start at Line 15.

The Court: You may read any question and any answer afterwards. You may ask him if he did this, that or the other.

Mr. Biele: He hasn't established it on his cross-

(Testimony of Johnny A. Anderson.)

examination, your Honor, and he thinks he can impeach him.

The Court: The objection is overruled.

Q. (By Mr. Howard): Did you make that answer to that question at that time?

A. Would you state the question again, please?

Q. (Reading):

“Q. Did you observe whether the propeller of the Cotton State was turning as you passed off the face of the dock? A. I did not.” [525]

A. I did.

Q. Is that a correct statement?

A. Right.

Q. And you made that answer? A. Yes.

Q. Next question:

“Q. Was there anything said about that aboard the tug at the time? A. No.”

Did you make that answer to that question?

A. Yes.

Q. That's a true answer, is it? A. Yes.

Q. (Reading):

“Q. Did you observe any signs or warning boards around the stern of the Cotton State? A. No.”

Is that a correct answer?

A. That's right.

Q. You made that answer? A. Yes.

Q. (Reading):

(Testimony of Johnny A. Anderson.)

“Q. Did you observe any persons on the deck or on the stern? A. No.”

Was that a correct answer? [526] A. Yes.

Q. And you made that answer at the time?

A. Yes.

Q. Then the statement which you made this afternoon is not correct when you state that you did see someone on the after deck of the vessel?

A. Well, I said that there was somebody around four or five hatch.

Q. Well, that's on the deck of the vessel, isn't it, Mr. Anderson? A. Yes.

Q. Did you or did you not see someone on the after deck of the vessel as the ship passed the stern and started into the slip?

A. If that's the after deck, yes.

Mr. Biele: Your Honor, I object to this. The original question was whether he heard anybody on the after deck.

The Court: The objection is overruled.

Mr. Howard: May I have that question back, your Honor?

The Court: You may. Mr. Reporter, read it.

(The reporter read back the last question and answer.)

Q. (By Mr. Howard): Your answer is you did see someone? [527] A. Yes.

Q. Then the answer that you gave in the deposition on September 26, 1958, is not a correct statement?

(Testimony of Johnny A. Anderson.)

A. Well, what do you class as the after deck now?

Q. Anything aft of the midship house is what I'm referring to, Mr. Anderson.

A. That wasn't what I was thinking.

Q. The next question:

“Q. If there had been any there, would you have seen them? A. If I had been looking, yes.”

Was that a correct statement? A. Yes.

Q. (Reading):

“Q. Well, were you looking? A. Yes, I was.”

Was that a correct statement? A. Yes.

Q. And it is your testimony now that you did see someone on the after deck?

A. I didn't pay much attention.

Q. Well, did you or did you not see someone on the after deck? A. Yes, there were—yes.

Q. How many?

A. I didn't count them. [528]

Q. Did you recognize them? A. No.

Q. What were they doing?

A. Talking to us.

Q. Talking to you? A. Hollering.

Q. Could you hear what they were saying?

A. No.

Q. Could you identify any of those persons on the deck of the ship? A. No.

Q. Now, Mr. Anderson——

(Testimony of Johnny A. Anderson.)

Mr. Howard: May the witness have Libellant's Exhibit 5, please?

The Court: He may.

(The exhibit was handed to the witness.)

Q. (By Mr. Howard): Will you state for us, please, where the line was secured on the ship leading to the forward outboard stanchion on Barge 25 as you have testified to? Will you state that in words first, please?

A. On the front—forward part of the superstructure.

Q. Mr. Anderson, was that line attached on the main deck or one deck above the main deck?

A. One deck above.

Q. Yes, and that would be aft of the forward end of the [529] midship house, would it not?

A. It was in the forward part of the midship house.

Q. Yes, but it would be some distance aft of the forward leading edge of the midship house, is that correct?

A. That's not too clear. The line was up in the forward part of the wheelhouse.

Q. Was it in line with the forward edge or was it forward or aft of the leading edge of the midship house, of the superstructure?

A. It was forward.

Q. Now will you take a pencil, please, and would you mark with an arrow showing where you now testify the line was attached leading from the ship

(Testimony of Johnny A. Anderson.)

to the barge, to the forward outboard stanchion on the barge. You're using a black pencil, aren't you?

A. Yes.

(Witness marks on Libelant's Exhibit 5.)

Q. Would you make an arrow out from that and put your——

Mr. Biele: Your Honor, this is improper cross-examination. We didn't go into this on direct.

The Court: Any response?

Mr. Howard: Well, your Honor, the question was most certainly gone into as far as the position of the barge when it came in.

The Court: What was it that was asked on [530] direct that you feel justifies this?

Mr. Howard: The witness testified on direct examination, "The forward end of No. 25 was in line with the forward part of the superstructure of the Cotton State," and that's precisely what I'm examining the witness about at the moment.

The Court: The objection is overruled.

Mr. Howard: May I have the last question?

The Court: You may.

(The reporter read the last question as follows: "Q. Would you make an arrow out from that and put your——")

Q. (By Mr. Howard): ——initials at the end of that arrow.

(Witness marks on Libelant's Exhibit 5.)

Q. Has that been done, Mr. Anderson?

(Testimony of Johnny A. Anderson.)

Mr. Howard: And when it is done, your Honor, I would like to see the exhibit.

The Court: Have you finished?

A. Yes, your Honor.

The Court: Let Counsel see it.

(Libelant's Exhibit 5 was examined by all Counsel, then returned to the witness.)

Q. (By Mr. Howard): Could you determine, Mr. Anderson, to what the line was attached on the ship? [531] A. No.

Q. Now, as I understand it you remained on the stern of the tug after the barge came alongside and this line was passed and secured to the outboard stanchion by your fellow deck hand Mr. Hafey, you remained on the stern of the tug? A. Yes.

Q. And did you continue to remain on the stern of the tug as the tug maneuvered around as you described to get back to Barge No. 15?

A. Yes.

Q. Did you continue to watch the barges during that period of time? A. No.

Q. What were you doing?

A. Getting the line ready again.

Q. Well, at times when you were not getting the line ready did you observe the condition of those barges? A. No.

Q. Mr. Anderson, will you state whether or not the barges moved aft after the line was secured?

A. I couldn't say.

The Court: The line from what vessel to what

(Testimony of Johnny A. Anderson.)

vessel did you last refer in your answer, Mr. Anderson?

Q. (By Mr. Howard): Mr. Anderson, referring again to your [532] deposition——

The Court: Just a minute. Read the last question and answer.

(The reporter read the question and answer as follows: “Q. (By Mr. Howard): Mr. Anderson, will you state whether or not the barges moved aft after the line was secured? A. I couldn’t say.”)

The Court: In making that answer to that question, what line, that is extending from what ship to what ship, were you referring to, Mr. Anderson?

A. The line leading from the barge to the ship.

The Court: Is that the one you referred to?

A. Oh, no, the line on the tug.

The Court: The line on the tug to what vessel?

A. To the barge, your Honor.

The Court: Is that what you were inquiring about, Mr. Howard?

Mr. Howard: I was inquiring, your Honor, as to whether the barge moved aft alongside the ship after the line was secured between the forward outboard stanchion of the scow and the position that he has [533] marked on Exhibit 5 on the ship.

The Court: What ship?

Mr. Howard: The Cotton State.

The Court: You better inquire then, because

(Testimony of Johnny A. Anderson.)

the answer finally made does not let the Court have that understanding.

Q. (By Mr. Howard): Mr. Anderson, did you observe whether the Barge No. 25 and Barge No. 15 remained stationary alongside the ship after this line had been secured by deck hand Hafey on the forward stanchion of the outboard corner of the No. 25 to the point which you have marked on the deck of the ship?

The Court: By "the line" what line are you referring to, Mr. Howard?

Mr. Howard: The mooring line for the barge.

The Court: Extending down from the ship, the Cotton State, to the barge, or——

Mr. Howard: Yes, your Honor. That is the line I'm referring to.

The Court: You may answer.

A. After it was tied up?

Q. (By Mr. Howard): Yes.

A. I didn't notice anything after that.

Q. Now, Mr. Anderson, referring to the occasion when your deposition was taken on September 26th—— [534]

Mr. Howard: Referring now, Counsel and your Honor, to Page 13.

The Court: Of this same deposition?

Mr. Howard: The same deposition, your Honor.

The Court: Page 13. Proceed.

Mr. Howard: Starting at Line 17.

Q. (By Mr. Howard reading):

(Testimony of Johnny A. Anderson.)

“Q. Could you determine from your position on the tug as it moved from the head of the tow around to a position off the trailing barge, whether the barges made any change in position from the time the tow line was cast off?

“A. Well, we pulled right up into position, and we got a line on——

“Q. And they remained in that position thereafter?

“A. I don't know whether they remained. They must have because it didn't slip back. They had a line fast up there. I don't know what they did with it. They had control of it on the ship. Whether they moved it forward or backward by the line on the ship, I don't know.”

Do you remember those questions being asked? [535]

A. Yes.

Q. And those answers having been given?

A. Yes.

Q. Including when you say, “They must have because they didn't slip back,” do you remember making that statement?

A. (Witness nods his head.)

Q. You're shaking your head affirmatively?

A. Yes.

Q. Is that a true statement? A. Yes.

Q. Is that your testimony today?

A. Would you ask me that question again, please?

(Testimony of Johnny A. Anderson.)

Q. Is that your testimony today? A. Yes.

Mr. Howard: That's all.

Redirect Examination

By Mr. Biele:

Q. Mr. Anderson, when you gave that answer at Everett do you recall the very last sentence in that, "Whether they moved it forward or backward by the line on the ship, I don't know," do you recall giving that answer? A. Yes.

Q. Is that your testimony today, that you don't know? A. Yes. [536]

Q. Mr. Anderson, when you went aboard the scows after they were rocking did you see any evidence that the scows were any further apart because of a strain on the line than they had been when you took them in tow at West Cove, or were they in the same position?

A. They were in the same position.

Mr. Biele: May I confer with Mr. Crutcher, your Honor?

The Court: You may do that.

(Brief pause.)

Mr. Biele: We have no further questions, your Honor.

The Court: Anything further?

Mr. Howard: No other question, your Honor.

The Court: You may step down.

Mr. Biele: Your Honor, may this witness be excused?

Mr. Howard: No objection.

The Court: Mr. Anderson may be excused and go on about his own business if he wishes to do so.

(Witness excused.)

Mr. Biele: Mr. Hafey. [537]

LAWRENCE S. HAFEY

called as a witness in behalf of respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Biele:

Q. Mr. Hafey, will you tell the Court your full name? A. Lawrence S. Hafey.

The Court: Lawrence, L-a-w-r-e-n-c-e, is that right?

A. Yes, your Honor.

The Court: S. Hafey, H-a-f-e-y?

A. Yes, your Honor.

The Court: You may inquire.

Q. (By Mr. Biele): Where do you live, Mr. Hafey?

A. 1511 18th Street, Everett, Washington.

Q. How old are you? A. Twenty-four.

Q. Are you married? A. Yes.

Q. Do you have any children? A. Yes.

Q. How many do you have? A. One.

The Court: Pardon, how many?

A. One, sir. [538]

The Court: You may inquire.

(Testimony of Lawrence S. Hafey.)

Q. (By Mr. Biele): Mr. Hafey, what is your employment now?

A. Deck hand for Pacific Tow Boat Company.

Q. How long have you been employed by Pacific Tow Boat Company?

A. Since the spring of '52.

Q. What are some of the tugs you have served on?

A. Some of them?

Q. Yes.

A. Sea Roamer, Sea Monster, Lea Moe, Sea Horse, Sea Sled, Seaweed, Sea Vamp——

Q. Mr. Hafey, has your experience been continuous since 1952 with the Pacific Tow Boat Company?

A. No, there was a two year interruption from December of '53, to December of '55.

Q. What were you doing then?

A. I was in the Army then.

Q. What kind of service did you have in the Army?

A. I was a squad leader in the 82nd Airborne Division.

The Court: You do not speak very distinctly.

A. I was a squad leader in the 82nd Airborne Division, your Honor.

The Court: A squad leader?

A. Yes, sir.

The Court: Speak distinctly. [539]

Q. (By Mr. Biele): What type of duty did you have there, Mr. Hafey?

A. Airborne infantry.

Q. Is that the same as a paratrooper?

(Testimony of Lawrence S. Hafey.)

A. Yes, sir.

Q. Mr. Hafey, were you a deck hand on the tug Lea Moe in January of 1957, when she shifted some scows from West Cove to Pier 1 outboard the Cotton State?

A. Yes, sir.

Q. Did you have anything to do with the manner in which the scows were made up at West Cove?

A. Yes, I did.

Q. What job at West Cove did you have?

A. We coupled the two scows together.

Q. Did you do that by yourself or did you have have someone assist you?

A. No, Mr. Anderson assisted me.

Q. How were those scows made up in West Cove?

A. Right together with four and a half inch line.

Q. And how were the scows attached?

A. Together?

Q. Yes. A. Right close.

Q. How close together were they?

A. Oh, at the maximum they couldn't have been any more than [540] eighteen inches.

Q. Would you tell the Court where the lashings or attachments were between the two scows?

A. Between the two stanchions on either side of either scow, scow 25 and scow 15.

Q. Would that be between the stern stanchions on the No. 25 and the bow stanchions on the No. 15?

A. Yes, it was.

Q. Mr. Hafey, do you recall when the tug

(Testimony of Lawrence S. Hafey.)

brought the scows past the stern of the Cotton State? A. Yes.

Q. Did you observe a blinking red light on the stern of the Cotton State at that time?

A. No, I did not.

Q. After the scows and the tug were past the stern of the Cotton State, Mr. Hafey, did you have occasion to go aboard either one of the scows?

A. Yes, I did.

Q. Which one did you go aboard?

A. Eclipse 25.

Q. And how did you do that?

A. I just got off the stern of the boat onto the scow.

Q. Now, what was the occasion that you went aboard the scow No. 25?

A. There was a man on the Cotton State yelling, and we [541] wanted to see what he wanted.

Q. Where was this man on the Cotton State yelling from?

A. Oh, he was just a little aft of the house, the midship house.

Q. And where did you go on the No. 25?

A. Well, I was trying—I was on the deck at first and then I went up on top of the load.

Q. On top of the load were you able to converse with anyone on the Cotton State?

A. Yes, I was.

Q. Did you converse with anybody on the Cotton State? A. Yes, I did.

(Testimony of Lawrence S. Hafey.)

Q. What conversation did you have with this person on the Cotton State?

A. He informed me that we had the scows in the wrong position. He wanted Eclipse 15 up at the one and two hatch there and Eclipse 25 aft.

Q. Did you recognize this person that you talked with on the deck of the Cotton State?

A. No.

Q. Did you identify him as anybody from Pacific Tow Boat Company? A. No, sir.

Q. Was he anybody that you knew from Eclipse Lumber Company? A. No, sir. [542]

Q. Did this person appear to be one of the officers or someone connected with the ship?

A. He seemed to be someone of authority.

Mr. Howard: I move to strike the answer as not within the witness' knowledge.

The Court: The motion is granted and it is so ordered. You will have to answer the questions, Mr. Hafey, directly.

A. Yes, sir.

Q. (By Mr. Biele): Did this person with whom you talked appear to have authority with regard to the spotting of the scows?

A. Yes, sir, he did.

Q. Now, what were you told regarding the manner of the landing of the scows?

A. He said we could tie them up there at the—tie them there just forward the midship house right there, about even with the midship house, and he threw a line down for us.

(Testimony of Lawrence S. Hafey.)

Q. Now, where was this line thrown from?

A. Right up there by the forward part of the midship house.

Q. Whose line was it?

A. The ship's line.

Q. Was that done after the scows were brought alongside? A. Pardon me? [543]

Mr. Howard: Objected to as leading, your Honor.

The Court: Sustained.

Q. (By Mr. Biele): When was that line thrown down from the deck of the Cotton State?

A. Right after we had spotted the scows.

Q. Now, where did you spot the scows, Mr. Hafey?

A. Right at the forward part of the midship house.

Q. Was there any trouble in landing the scows alongside the Cotton State? A. None.

Q. Now, what if anything was done with this line that was passed down from the Cotton State?

A. I caught it on the starboard forward stanchion of Eclipse 25.

Q. Would you state whether that was the same stanchion or fastening that the tug's line had been fastened to or was fastened to? A. It was.

Q. How did you secure that line on that stanchion?

A. With a round turn around the stanchion tied with a bowline.

Q. Did you put the line under the towline or

(Testimony of Lawrence S. Hafey.)

over the towline? A. Yes, under it. [544]

Q. Why did you do that?

A. So I could get the tug's line off.

Q. Did you ever request or designate where you wanted the line from the Cotton State to be led from? A. No.

Q. Was that line secured on the Cotton State?

Mr. Howard: Objected to as leading.

The Court: Sustained.

Q. (By Mr. Biele): What happened to that line from the Cotton State that you put on the forward starboard stanchion?

A. They pulled it snug and secured it.

Q. Who pulled it snug and secured it?

A. The man aboard the Cotton State.

Q. Whereabouts on the Cotton State was that line secured?

A. It was just about straight across from us, maybe a little forward.

Q. Where was that with reference to the bridge of the Cotton State?

A. Oh, a little forward of it, I believe.

Q. Now, what if anything was done after the line from the Cotton State was secured?

A. I took the eye of the towline of the tugboat off the stanchion and passed it back to the——

Q. When you did that was it necessary to disturb the line [545] from the Cotton State to the scow? A. No, it was not.

Q. Why was that?

(Testimony of Lawrence S. Hafey.)

A. The line from the Cotton State was underneath.

Q. What did you do with that line from the tug to the scow?

A. Passed it to Mr. Anderson on board the boat.

Q. Briefly could you state what Mr. Anderson was doing while you were securing the line from the Cotton State to the scow?

A. Yes, he was working aboard the ship.

Q. At any time did the tug have occasion to push the scows aft? A. No, he did not.

Q. At any time did the tug have occasion to hold the scows from drifting back aft?

A. Yes, he did.

Q. How was that done?

A. The same way I before mentioned, by holding from the outboard stanchion into the ship.

Q. Which way was the wind blowing on this occasion? A. It was an offshore wind.

Q. How would that affect the scows?

A. It would drift them out.

Q. Was it necessary to hold the scows by the tug against the wind? [546] A. Yes.

Q. Mr. Hafey, what did the tug do after the line was passed from you to Mr. Anderson, that is the towing line?

A. Well, he started to maneuver to get back so we could pick off E-15.

Q. What did you do?

A. Well, I went aboard the lumber and started aft of the E-15.

(Testimony of Lawrence S. Hafey.)

Q. Did you go atop of the lumber on E-15?

A. No, I went atop of the lumber on E-25.

Q. You climbed up on top of the lumber on E-25?

A. Yes, I did.

Q. Where did you go then?

A. I went aft between the scows.

Q. Now, as you were going aft, Mr. Hafey, as you were going aft on the No. 15 did you have occasion to hear any unusual noises?

A. When I was between the scows I did.

Q. What noise did you hear?

A. Well, it was a noise from within the ship.

Q. Could you state to the Court what that noise sounded to you like?

A. Well, it sounded to me like the ship's engine, the ship's turbine, but——

Q. At the time you heard that noise could you see whether [547] the scows were in any trouble or not?

A. Oh, E-15 was bouncing pretty violently.

Q. When did you observe the trouble, if any, on No. 15?

A. Well, I noticed it bouncing like I said, and then I heard——

The Court: I believe he is trying to find out from you when you saw anything.

A. Yes, sir, I was trying to explain.

The Court: Yes, but you were not answering directly, Mr. Hafey, and I think you could.

A. Well, after that I shined my light down into the water, I seen this water rushing and then I

(Testimony of Lawrence S. Hafey.)

flashed my light into the hold and I seen the water rushing through the hold, and I——

The Court: That might have been yesterday or twelve years ago or just the day of this accident. Could you just tell him when and what time of the day or with reference to some movement or operational activity that you were then engaged in? Something to relate it to by way of time of occurrence, is what is encompassed in his question.

A. Yes, your Honor. It was right immediately after I seen the scow start to rock. I don't know what time it was, but it was at that time.

The Court: What were you doing when you first saw [548] the rocking of the scow?

A. I was just standing there, your Honor.

The Court: Standing where?

A. Between the two scows on Eclipse 25.

The Court: Was that after or before the tug cut loose its towline from the leading scow?

A. That was after, your Honor.

The Court: How many minutes, if you know?

A. Approximately three or four, somewheres around in that vicinity.

The Court: You may proceed.

Q. (By Mr. Biele): Mr. Hafey, am I correct that it was three or four minutes after the towline was taken in that you first saw this rocking and rolling?

A. Yes, sir.

Mr. Biele: May I confer with Mr. Crutcher?

The Court: You may do that.

(Brief pause.)

(Testimony of Lawrence S. Hafey.)

Q. (By Mr. Biele): Mr. Hafey, when you observed this rocking and rolling will you state what condition the coupling lines were in between the two scows?

A. They were still made fast and in fine shape.

Q. Were they in the same condition that you had tied them up at West Cove?

Mr. Howard: Objected to as leading. [549]

The Court: Sustained.

Q. (By Mr. Biele): Were they any different from what you had done at West Cove?

Mr. Howard: Objected to as leading.

The Court: Sustained.

Q. (By Mr. Biele): Will you describe to the Court the condition of the lines between the two scows when you first observed this rocking and rolling?

A. They were in good shape, the same way as we left them when we secured them in West Cove.

Q. Will you describe to the Court how much distance, if any, was between the two scows at that time?

A. Somewheres in the vicinity of eighteen inches, a little more or a little less.

Q. Now, at the time of the rocking and rolling that was observed by you, Mr. Hafey, had the tug, the Lea Moe, taken the No. 15 in tow yet?

A. No, it had not.

Q. Had it put a line aboard the No. 15?

A. No, it had not.

(Testimony of Lawrence S. Hafey.)

Q. What did you do, if anything, Mr. Hafey, after you observed the rocking and rolling?

A. Like I said, I shined my light down in there.

Q. What did you do thereafter?

A. Well, then I told—the boat was coming up alongside [550] and I yelled at the skipper and told him that the scow was sinking.

Q. What did the captain do on the tug?

A. He started maneuvering the boat into a position to pull her out of there.

Q. Did you have anything to do with the lines between the 15 and the 25 as the tug came alongside?

A. Yes, I cut off the—it would be the port side coupling line on the inside.

Q. Would those be the lines nearest the ship?

A. Yes, they would be.

Q. Who cut off or who unfastened the coupling lines on the starboard side?

A. Mr. Anderson.

Q. That would be the lines furthest away from the ship?

A. Yes, it would.

Q. Did you go aboard the No. 15 as it was towed out from the stern area?

A. No, I did not.

Q. Did you remain on No. 25?

A. Yes, I did.

Q. After the scow was towed away did you have occasion to go on the No. 25?

A. Yes, I did.

Q. How long after the scow was towed away was it that you [551] went on the lumber load?

A. Oh, possibly four or five minutes.

(Testimony of Lawrence S. Hafey.)

Q. Now, when you went aboard that lumber load did you have occasion to see whether the scow No. 25 was in the same position that it had been left when the tug cast off? A. Yes, I did.

Q. Was it in the same position?

A. It did not appear to be.

Q. What change, if any, had occurred?

A. It looked like it had come back aft about thirty or thirty-five feet.

Q. That would be from where?

A. From the midship house, the forward part of the midship house.

Mr. Biele: That's all.

The Court: You may cross-examine.

Cross-Examination

By Mr. Howard:

Q. Mr. Hafey, have you ever served on ocean going vessels, either merchant vessels or government vessels of any kind? A. No, I have not.

Q. Have you ever worked in the engine room of a vessel? A. No, I have not. [552]

Q. What do you mean when you say "offshore wind"? A. It was blowing offshore.

The Court: That is from the shore out to sea or from the sea in toward the shore?

A. It was blowing off the shore to the sea, sir.

Q. (By Mr. Howard): Blowing out towards the sea? A. Yes, sir.

Q. Now, Mr. Hafey, what was the height of the lumber on these barges?

(Testimony of Lawrence S. Hafey.)

A. Approximately sixteen feet, around there.

Q. Above the deck of the scow?

A. Around there, yes, sir.

Q. Was that pretty uniform on both barges, Mr. Hafey?

A. It was, I believe, to the best of my knowledge.

Q. At both ends of the barges, both fore and aft, was it leveled off pretty well?

A. Yes. There was a few—you know, once in awhile there was a wide spot there, but other than that they were fairly uniform.

Q. Was it light or dark as the Lea Moe was towing these barges from West Cove into the slip alongside the Cotton State?

A. It was after sunset.

Q. Was it dark or light? [553]

A. Well, it was fairly light. It would be dusk, it would be dark.

Q. It was dark, wasn't it? A. Yes.

Q. The tug had its navigation lights burning?

A. Yes, sir.

Q. Were there any lights on the scows?

A. No, sir.

Q. Now, as the Lea Moe came around the face or the end of the pier and turned and made the approach and entered the slip alongside the Cotton State was the spotlight from the Lea Moe ever shown on the stern or the rudder or the propeller of the Cotton State? A. I don't know.

(Testimony of Lawrence S. Hafey.)

Q. If it had been done would you have seen it?

A. I might have.

Q. Did you see it then?

A. No, I did not.

Q. Then it wasn't? A. I don't know.

Q. Now, where was this man on the steamer that you talked to?

A. He was just aft of the midship house, sir.

Q. And you can't identify him in any way?

A. No, sir, I can't. [554]

Q. You don't know whether he was a member of the crew or one of the officers of the ship or someone from shore? A. No, sir, I don't.

Q. What was your purpose in going aft on the Barge 25 after you had secured the line at the forward corner?

A. Well, I'd have to tie up the after end of E-25 and I'd also have to be back there to cut off E-15.

Q. In other words, you hadn't finished tying up the Barge 25?

A. I hadn't put the stern line out, no, sir.

Q. Did you notice whether there was a man aft of the midship house ready to pass you a line to tie up that barge?

A. Not at that time I never seen anybody, no.

Q. Later on did you notice whether there was someone there?

A. Yes, later on I finally got a line.

Q. When did you get the line?

(Testimony of Lawrence S. Hafey.)

A. Oh, it was possibly, or, fifteen minutes after the accident.

Q. Had you asked for the line?

A. Well, sir, there was nobody there for me to ask.

Q. You're sure there was no one on the after deck?

A. No one I could see, sir.

Q. Is it possible that there was someone there that you didn't see?

A. Oh, very possible. I could only see this side of the [555] ship, sir.

Q. Now, Mr. Hafey, when you started aft along the top of the load of lumber on this Barge 25 did you get any orders or instructions from anybody on the ship?

A. No, I did not.

Q. Did you request any information concerning the barges at that time?

A. No, I did not.

Q. You were the one man from the tug, as I understand, who was closest to the persons on the Cotton State?

A. Yes, sir.

Q. And you were also the man who happened to have the best view of what was going on, isn't that right?

A. I suppose so, sir.

Q. Could you see to the after end of your trailing barge No. 15 as you were up on top of the No. 25?

A. I could see the after part of the top of the load of E-25.

Q. Was there any light back there at all?

(Testimony of Lawrence S. Hafey.)

A. I mean of E-15. On E-15 you mean?

Q. On E-15.

A. No, there was no light on E-15, no.

Q. Could you determine where the after end of E-15 was with reference to the stern of the vessel?

A. Not real accurate. I mean—— [556]

Q. If there had been another man from the tug back there on that after scow he could have reported that to you, couldn't he?

A. I suppose he could have, yes, sir.

Q. And if there had been a light back there it would have made it a little easier to see where the stern of the tow was with reference to the stern of the vessel?

A. I don't really believe so, sir, no.

Q. Well, would a lantern not have made it more easy to determine the position of the stern of the barge?

A. I don't think so, sir.

Q. Now, Mr. Hafey, will you state whether or not as you walked aft along the top of the load of lumber on Barge 25, you made any observation as to whether the Barge 25 was stationary in its position alongside the ship?

A. Yes, they looked like they were pretty still then, sir.

Q. Did you at any time observe them moving in any direction?

A. I never actually noticed them moving in the extent that they were going along at any rate of speed, no, sir.

(Testimony of Lawrence S. Hafey.)

Q. In other words, during the time that you were tying up the barge at the forward outboard stanchion, continuing on through the time you climbed up on top of the load of lumber and as you walked aft along the top of the deck load on the Barge E-25 and climbed down to the point on Barge 25 where the two barges were close coupled [557] together you never observed the barges moving aft along the side of the ship, did you?

A. No, sir. I wasn't looking for them to be moving aft.

Q. If they had been moving aft would you have seen them?

A. If they would have been moving aft very fast I would have seen them, yes, sir.

Q. As a matter of fact they weren't moving aft, isn't that true, Mr. Hafey?

A. Well, sir, I don't really know because later on they were aft.

Q. Now, do you remember your deposition being taken on September 26th in Everett?

A. Yes, sir, I do.

Q. Do you recall the questions being asked that you answered under oath at that time?

A. Yes, I do.

The Court: Will you let me know the page? H-a-f-e-y.

Mr. Howard: H-a-f-e-y, your Honor.

The Court: What page?

Mr. Howard: Page 15, starting at the bottom of Page 14.

(Testimony of Lawrence S. Hafey.)

The Court: Line what?

Mr. Howard: Line 24, your Honor.

The Court: You may proceed. [558]

Q. (By Mr. Howard): This question was asked:

“Q. Did you observe whether the two barges were stationary alongside the ship’s side, or were they up against the ship’s side?

“A. They were lying against the ship’s side.”

Do you remember that question and that answer?

A. Yes, sir, I do.

The Court: That is not on Page 15, is it?

Mr. Howard: This is starting at the top of Page 15 now, your Honor.

The Court: You may proceed.

Q. (By Mr. Howard reading):

“Q. Were they moving forward or aft?

“A. No.”

Do you recall that question and answer?

A. Yes, sir, I do.

Q. (Reading):

“Q. They were stationary?

“A. Yes.”

Do you recall that question and answer?

A. Yes, sir, I do.

“Q. You are certain of that?

“A. It looked to me like they were stationary, yes.”

(Testimony of Lawrence S. Hafey.)

Do you recall that question and answer?

A. Yes. [559]

Q. (Reading):

“Q. Going back once again to the time when you were securing the mooring lines from the ship to the forward starboard stanchion on E-25, will you state whether or not that was secured tight, or was it left slack?

“A. The man aboard the *Cotton State*—he pulled it tight.”

Do you remember that question and that answer?

A. Yes, sir.

Q. Incidentally, Mr. Hafey, when did you last examine the transcript of your deposition? Have you looked at it today?

A. I can't remember if I looked at it today or not, sir.

Q. Were you in Mr. Biele's office this morning?

A. Yes, I was.

Q. Before you appeared in court. Did you look at the transcript of the deposition then?

A. I might have, yes, sir.

Q. You might have. The next question:

“Q. Was it tight before you left?

“A. It was snug. It wasn't really—you know what I mean by snug. It looked like it was made fast. It wasn't winched out, no.” [560]

Do you remember that question and that answer?

(Testimony of Lawrence S. Hafey.)

A. Yes, sir.

Q. (Reading):

“Q. From your experience will you state whether or not the line was secure and drawn tight in such a fashion as to hold the barge in that position? A. Definitely.”

Do you recall that question and that answer?

A. Yes, sir.

Q. And were those correct statements?

A. Yes, sir.

Q. And is that your testimony today?

A. Yes, sir.

Q. Did you ever make a particular observation as to what lights were burning around the stern of the vessel as the tug proceeded to tow the barges into the slip?

A. Just noticing and looking around there when we come in, yes, sir.

Q. Before this accident occurred, Mr. Hafey, was there any line secured in any way between Barge 15 and the Cotton State? A. No.

Q. And as I understand your testimony it was the intention of the tug Lea Moe to go back and pick off the E-15 and bring it up forward; is that right? [561] A. Yes, sir.

Q. Now, this noise that you heard that you testified to, what do you think that was, Mr. Hafey, do you know?

A. I stated it sounded like a turbine to me, some-

(Testimony of Lawrence S. Hafey.)

thing inside the ship, some kind of a ship's engine or motor or something.

Q. Do you know what the turning gear on a vessel consists of?

A. All I've heard about turning gear is what I've heard since this accident has occurred.

Q. Are you familiar with what kind of a mechanical device that is on a C-2 type vessel?

A. Just what I've heard explained in court, sir.

Q. Do you know how large a motor that has?

A. I heard it was a ten horsepower, sir.

Q. Do you know where that is located on the ship?

A. No, sir, I don't.

Q. Would you be able to state, Mr. Hafey, whether or not the noise you heard was from the turning gear motor on the Cotton State?

A. Never having heard a turning gear motor, but I have heard ship's turbines when we were docking ships, sir.

Q. You have heard the turbine as you were docking a ship?

A. I have heard ships, yes, sir.

Q. And you believe the noise then was from the turbine and [562] not from the turning gear?

A. I believe it was something from within the ship, yes.

Q. I'll ask you again, are you able to state whether or not the noise that you claim you heard was from the turning motor in the engine room of the Cotton State?

A. No, I am not.

(Testimony of Lawrence S. Hafey.)

Q. And as I take it you heard that noise at just about the time that you saw Scow 15 bouncing pretty bad? A. It was just before, yes.

Q. Just before. A matter of seconds before?

A. Yes, sir.

Q. Going back to your testimony, Mr. Hafey, as to how this line from the Cotton State which was used at the forward end of Scow 25, how you secured that around the stanchion, will you give me that again, please?

A. Yes, sir. I took a round turn around the stanchion and tied it with a bowline.

Q. With a bowline? A. Yes, sir.

Q. A bowline knot? A. Yes, sir.

Q. That was below the towline of the vessel?

A. Well, actually it would be. I brought the—the towline was lying at the bottom of the deck so I couldn't get it all the way up underneath, so I had to bring it [563] up through the eye and take a slack turn and then tie the bowline.

Q. Incidentally, did you determine whether that was still intact after this accident occurred before you left the Scow 25? A. Yes, sir, I did.

Mr. Howard: That's all.

Redirect Examination

By Mr. Biele:

Q. Was it intact? A. Yes, sir, it was.

Mr. Biele: That's all, your Honor.

The Court: Step down.

(Testimony of Lawrence S. Hafey.)

Mr. Biele: May this witness be excused?

The Court: Wait just a minute, Mr. Hafey. Where were you when the two scows were being towed alongside the vessel and just before they stopped the towing operation so far as the tug and towline were concerned?

A. Just before we brought them alongside the ship, sir, I was on the Eclipse 25.

The Court: The leading barge?

A. Yes, sir.

The Court: Were you at anytime while the vessel or any part of the tow, tug and tow, were [564] passing the ship's propeller area, were you on board the E-15 anywhere at any time?

A. No, sir.

The Court: Anything else?

Mr. Biele: I have no further questions.

The Court: You may step down.

Mr. Howard: No questions, your Honor.

Mr. Biele: May the witness be excused, your Honor?

Mr. Howard: I have no objection.

The Court: The witness may be excused and go on about his business if that is what he wishes to do.

(Witness excused.)

The Court: Any witness is welcome to remain after being excused if he should wish to do that.

Mr. Crutcher: Your Honor, we have one other witness.

The Court: Call him. We will have to take a recess just about five minutes later.

Mr. Crutcher: Mr. Wallace. [565]

WALTER D. WALLACE

called as a witness in behalf of respondents-claimants, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name to the Court? A. Walter D. Wallace.

Q. Where do you live, Mr. Wallace?

A. 805 Rucker Avenue in Everett.

Q. What is your occupation?

A. I'm the manager of Pacific Tow Boat Company.

Q. That is one of the parties to this action, is it not? A. Yes.

Q. How long have you been in the towboat business? A. Since 1938.

Q. Would you state just briefly to the Court what your experience has been in the towboat business?

A. I started working for the Foss Company in Seattle while I was still in high school and I worked for them as I was going to college, and after the war I went to work for Pacific Tow Boat in Everett.

Q. Incidentally, what was your experience during the war?

A. I was a commanding officer of several ships, commissioned ships in the United States Navy.

(Testimony of Walter D. Wallace.)

Q. And since the war have you been—I guess we refer now [566] to World War II—have you been continuously engaged in the towboat business?

A. Except for during the Korean trouble when the Navy called me back for two years.

Q. How long have you been manager of Pacific Tow Boat Company in Everett?

A. Oh, the last three years.

Q. Now, in the course of your experience have you had occasion to deal with the lighters used for carrying lumber from shore to ships in Everett and other ports on the Pudget Sound?

A. We take care of all Eclipse mill's lighters that are used for that purpose.

Q. Is that a large shipper of lumber?

A. It all depends on what the market conditions are.

Q. Well, I appreciate that, but I mean does it do a substantial business in export shipments of lumber?

A. Yes, it does.

Q. What is the nature of your arrangement with Eclipse Lumber Company? Is there any written contract?

A. No, sir.

Q. Is it an oral arrangement?

A. Yes, sir.

Q. Would you state to the Court generally what the functions or duties of Pacific Tow Boat are so far as the [567] transportation or towing of lighters is concerned for Eclipse Lumber Company? And I refer first of all to the matter of the place and time at which you pick up the lighters.

(Testimony of Walter D. Wallace.)

A. Eclipse mill is some seven miles up river from what we call Bayside where steamships arrive.

The Court: At this time we will take a recess for about ten minutes.

(Short recess.)

The Court: You may proceed.

Mr. Crutcher: Thank you, your Honor. Would the reporter please repeat the last question?

The Court: That will be done.

(The reporter read the last question and answer.)

Q. (By Mr. Crutcher): Would you continue with your answer, please?

A. We can only tow loaded scows in the river at certain stages of the tide, and arrivals of steamships are somewhat changeable, and as a result as soon as the scow is loaded and is designated for a ship, normally at Pacific Tow Boat's convenience we pick up that scow at the proper stage of the tide and bring it to Bayside where it will be handy so that there will be no delay once the ship arrives in port to get the scows alongside. [568]

Q. And did this arrangement prevail in January of 1957? A. Yes, it did.

Q. Would you state what the practice is so far as manning of the lighters is concerned?

A. The lighters are unmanned. We furnish

(Testimony of Walter D. Wallace.)

everything in the way of requirements to move the lighters from the mill to storage and then to alongside the ship.

Q. Is it customary to station crew members on board the lighters during towage?

A. No, only during tying up periods.

Q. Is there a standard crew complement for the tugs used by Pacific Tow Boat Company in hauling lumber lighters?

A. Of the same eighteen boats that operate in Everett harbor, not in regards to the kind of a job they do but the size of the vessel, has a certain number required as crew. Most of the boats are two-men crew boats. There are some four boats, five boats I think, in the harbor altogether that carry three men, and the Lea Moe is one of that class.

Q. Now, by three men do you mean two deck hands and a master or captain? A. Yes, sir.

Q. Would you state what the practice is so far as the lighting of the scows or lighters is concerned in transportation down the Snohomish River and into the port of Everett? [569]

A. The tugs carry kerosene lanterns aboard which they place on the scow for lights when required.

Q. Are those lanterns furnished by Pacific Tow Boat Company? A. Yes, sir.

Q. Were you working at the office of Pacific Tow Boat Company in Everett on the evening of January 10, 1957? A. Yes, sir.

Q. And are you familiar with the delivery of the

(Testimony of Walter D. Wallace.)

scows E-15 and E-25 to the Cotton State on that evening? A. Yes, sir.

Q. Will you state whether you received any directions from Eclipse Lumber Company with respect to the delivery of those scows to the Cotton State on that evening?

A. Only several days before when we were informed that the scows were loaded.

Q. And what was the nature of that instruction or direction?

A. Merely that scows Eclipse 25 and 15 were now loaded for the Cotton State.

Q. Was there anything different in those instructions or directions than was usual in the case of delivering lighters for the Eclipse Lumber Company? A. No, sir.

Q. Was anyone from Eclipse Lumber Company present at the premises of Pacific Tow Boat Company or on board those vessels that evening? [570]

A. No, sir.

Mr. Howard: Objected to unless it is established that he was present.

Mr. Crutcher: Oh, I beg your pardon. I'll withdraw the question.

The Court: The answer is stricken.

Q. (By Mr. Crutcher): I misspoke myself, Mr. Wallace. Was anyone from Eclipse Lumber Company present at the place of business of Pacific Tow Boat Company on that evening?

A. No, sir.

Q. Was anyone from Pacific Tow Boat Com-

(Testimony of Walter D. Wallace.)

pany on board the Cotton State on that evening before the accident? A. No, sir.

Mr. Crutcher: I have no other questions.

Cross-Examination

By Mr. Howard:

Q. Mr. Wallace, were you aboard the Cotton State after the accident? A. Yes, sir.

Q. How long after the accident?

A. When I arrived the Lea Moe was just towing the Eclipse 15 away from the stern of the ship.

Q. How were you notified of the accident?

A. I had intended to be there as soon as I could that [571] evening in that we have actually three customers involved. One is the Eclipse mill, the other is the steamship company and the third is the stevedoring company, and I if possible always visit the job in the case of a ship and be sure everything is in order and get the requirements for the night.

Q. Were you on the dock, Port Dock No. 1 in Everett, when the Cotton State approached to make a landing? A. No, sir.

Q. Were you on the dock, Port Dock No. 1, Everett, before the gangway was lowered?

A. No, sir.

Q. What type of vessels were you in command of during World War II while in the Navy service?

A. SC's and PC's.

Q. Those being in laymen's terms what?

(Testimony of Walter D. Wallace.)

A. They are escort vessels assigned to convoy duty.

Q. How large?

A. A PC is 173 feet long and an SC is 110 feet.

Mr. Howard: That's all I have.

Mr. Crutcher: One other question.

Redirect Examination

By Mr. Crutcher:

Q. To clarify, Mr. Wallace, where were you at the time this [572] accident occurred on January 10, 1957?

A. I was at home, and I had a couple of long distance phone calls and as soon as I finished with those I left for Pier 1.

Q. Thank you.

Mr. Crutcher: I have no other questions.

The Court: Where is Pier 1 from the pulp mill, the Weyerhaeuser pulp mill near the Great Northern Railroad station in Everett?

A. Pier 1, your Honor, is about two hundred feet north of the Weyerhaeuser property.

The Court: It is in that dock or waterfront area right there in the vicinity of the railroad station and the Weyerhaeuser pulp mill in downtown Everett, Washington?

A. Yes, sir, it's immediately west of the railroad station.

The Court: You may inquire.

Mr. Howard: I have no other questions, your Honor.

Mr. Crutcher: No other questions, your Honor.

The Court: Step down.

(Witness excused.)

Mr. Crutcher: I would like to inquire of the clerk whether Respondents' Exhibit A-1 has as yet been [573] admitted in evidence.

The Clerk: It has been admitted, on the 26th.

Mr. Crutcher: Thank you. Has A-2 also been admitted?

The Clerk: Yes.

The Court: Will you pause for a moment, Mr. Clerk. May I see A-1.

(The exhibit was handed to the Court.)

The Court: You may proceed, Mr. Crutcher.

Mr. Crutcher: Thank you, your Honor. I merely wanted to inquire further whether Respondent's Exhibit A-3 has been admitted.

The Clerk: A-3?

Mr. Crutcher: Is there an A-3? I may have misnumbered this.

The Court: A-1 and A-2 are the only ones that at this moment are in my notes. Each of them has been admitted.

Mr. Crutcher: Thank you very much, your Honor. At this time the respondent Pacific Tow Boat Company rests and the cross-libelant and partnership doing business as Eclipse Lumber Company also rests, your Honor.

The Court: Is there any rebuttal?

Mr. Howard: I would like to call Mr. Kalem.

The Court: Come forward and be sworn as a witness. [574]

HAROLD R. KALEM

called as a witness in behalf of libelant, being first duly sworn, was examined and testified in rebuttal as follows:

Direct Examination

By Mr. Howard:

Q. Will you state your full name and your address?

A. Harold R. Kalem, K-a-l-e-m.

The Court: K-a-l-e-m?

A. Yes, your Honor.

The Court: Kalem, Harold?

A. Harold R.

The Court: You may proceed.

Q. (By Mr. Howard): Your address?

A. 2560-12th Avenue West, Seattle, Washington.

Q. Your age? A. Forty-four.

Q. What is your occupation?

A. Marine engineer.

Q. Do you hold any licenses issued by the United States Coast Guard for engineering purposes?

A. Yes, chief engineer steam and third assistant motor vessels.

Q. Third assistant—— [575]

A. Third assistant motor vessels, yes.

(Testimony of Harold R. Kalem.)

Q. Is that steam license limited in any way as to tonnage?

A. No, it's any horsepower.

Q. Any horsepower. How long have you held a chief engineer's license, Mr. Kalem?

A. Since 1944.

Q. Have you served as a chief engineer on vessels under your license? A. Yes, sir.

Q. Have you served as a chief engineer or a licensed assistant engineer on turbine-driven vessels?

A. Yes, sir.

Q. What companies have you worked for as a licensed engineer?

A. On turbine driven vessels?

Q. Yes, on turbine driven vessels.

A. Alaska Steamship Company as first assistant on the Terre Haute Victory, then I was with Matson Navigation Company on two of their ships, and Ispian Steamship Company, two of their vessels; I worked with Ispian from 1946 until 1950 as chief engineer on two vessels of theirs. I'm presently first assistant on the Schuyler Otis Bland, which I've been——

The Court: Spell it, please.

A. S-c-h-u-y-l-e-r, Otis O-t-i-s, B-l-a-n-d. [576]

Q. (By Mr. Howard): Is that a turbine driven vessel?

A. That is a turbine driven vessel.

Q. By whom is that vessel operated?

A. That is operated by American Mail Line.

(Testimony of Harold R. Kalem.)

Q. Have you ever been employed as an engineer on a vessel operated by States Marine Line?

A. No, sir.

Q. Now, Mr. Kalem, in terms of years about how many years have you served as a chief engineer or a licensed assistant engineer on turbine driven ships altogether?

A. Well, approximately about thirteen years, twelve or thirteen years.

Q. Have you also served as a night engineer or relief engineer?

A. Yes, sir.

Q. And that's in a licensed engineer's capacity?

A. That's in a licensed engineer's capacity, yes.

Q. Now, Mr. Kalem, are you familiar with the type of turning gear and turning mechanism that is used on turbine driven vessels?

A. Yes, I am.

Q. Including C-2 type vessels?

A. C-2, too.

Q. And are you familiar with the procedures which are used in the engine room of the vessels operated by these [577] various companies that you have outlined with respect to the engaging or disengaging of the turning gear?

A. Yes, I am.

Q. Will you state what the procedure is on arrival at a dock from sea on a turbine driven vessel with respect to whether or not the engine room calls the bridge to obtain a clearance before engaging the turning gear and after receipt of a finished with engine bell?

(Testimony of Harold R. Kalem.)

A. The engine room does not call the bridge for permission to engage the jacking gear. When you get the finished with engine bell you immediately close the main stops on the boiler, drain your throttle and your lines, bleed them out, and engage the jacking gear, which takes approximately three minutes, four minutes, two minutes, it depends if you're on one boiler or if you're on two boilers.

Q. And why is that done immediately after the finished with engine bell?

A. To keep the main turbine from sitting any too great a length of time, because your rotor blade will warp.

Q. Is that same procedure followed on all vessels which you are acquainted with, turbine-driven vessels?

A. On all of them, and also on the Schuyler Otis Bland, because I do it myself.

Q. On any of the vessels on which you have served has it [578] been the routine to call the bridge first to get clearance before engaging the jacking gear after receipt of the finished with engine bell?

A. No, sir.

Q. While you're closing the boiler stops and draining the lines, draining the throttle into the turbine, will you state whether or not there would be any movement of the propeller?

A. Well, the propeller would move maybe one to two revolutions because you don't get way on the ship once she's tied up to the dock and so you use the astern throttle and when you see the indicator

(Testimony of Harold R. Kalem.)

move, then you open the stern throttle to stop her, and you keep doing that. You watch your gauge and you see your steam pressure is dropped off of your steam strainer and your throttles, all the steam is out of the lines at that time.

Q. Then if I understand correctly, as part of the procedure of closing down the plant and engaging the turning gear you would drain the steam out of the lines and out of the throttle?

A. That's right.

Q. In the course of which the propeller would turn one revolution or two revolutions in either direction?

A. That's correct. [579]

Q. And how long after that would you get the turning gear engaged?

A. Well, on this particular ship I am on, I'll quote that one, the junior engineer closes the stops. I am at the jacking gear. When I see him coming around the top grating and the stops are closed, the watch engineer or either the chief engineer will bleed the steam lines and the throttle, and then I immediately engage the jacking gear.

Q. What would happen, Mr. Kalem, if you allowed the steam to remain on the engine and did not take steps to drain the lines and engage the turning gear for a period of five minutes or more after the bell finished with engines was received?

A. Why, you would put a permanent set in your rotor, in the turbine rotor itself, or a sag.

Mr. Howard: That's all I have, your Honor.

The Court: You may cross-examine.

(Testimony of Harold R. Kalem.)

Cross-Examination

By Mr. Crutcher:

Q. Mr. Kalem, you have testified that you do not wait for any communication from the engine room before engaging the jacking gear. Does that mean that you don't expect to receive a communication from any other place on the [580] vessel, that is the after deck lookout?

A. You don't receive any communication. When they ring finished with engines, it is usually on the master's orders to the third mate or whoever happens to be on the bridge, and he rings the telegraph, and when he rings finished with engines, they're finished with engines.

Q. I appreciate that. What I'm asking is whether you proceed to start the jacking gear without receiving clearance from anyone on deck.

A. That's correct.

Q. Now, might it happen sometimes that there is something in the way of the propeller which would make it dangerous to the propeller to start the jacking gear immediately?

A. Well, I don't know what it would be, because when they're tying up they are very careful with their lines so that they don't get it in the wheel.

Q. So that you wouldn't expect that there would be anything to menace the wheel when you start the jacking gear?

A. Well, there wouldn't be anything. You're

(Testimony of Harold R. Kalem.)

coming in from sea and you come right alongside of a dock and the second officer is usually aft.

Q. Excuse me, Mr. Kalem, but I'm asking you the question, you start the jacking gear on the assumption that there is nothing menacing the propeller, isn't that true?

A. Well, that's the only way you could start it, because [581] you never get any orders from the deck department when to start the jacking gear or to engage it once you come in from sea.

Q. Well——

A. They are tying the vessel up. They know if there's anything back there. If there was anything there I imagine that they would notify you. I don't know.

Q. Yes, sir, thank you.

Mr. Crutcher: I have no other questions.

Mr. Howard: No questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Howard: That concludes the rebuttal, your Honor. May the witness be excused, your Honor?

The Court: The witness is excused. The libelant and cross-respondent now rests. Any surrebuttal?

Mr. Crutcher: None, your Honor.

The Court: How long do Counsel wish to argue this matter?

Mr. Howard: I would like to request twenty minutes in behalf of libelant, your Honor.

Mr. Biele: A similar time will be satisfactory to us, your Honor.

The Court: Very well. I will hear Counsel [582] from their present stations, and you may divide the twenty minutes between opening and closing in such portions as you wish to. The twenty minutes may be divided by you as between an opening argument and a closing argument.

Mr. Howard: Thank you, your Honor.

The Court: In whatever portions you wish to divide it.

(Thereupon, oral argument was presented to the Court by respective Counsel.)

ORAL OPINION

The Court: From the preponderance of the evidence in this case the Court finds, concludes and decides as follows:

That the Steamship Cotton State, after arriving from Seattle, completed its docking operations at the Port of Everett Pier 1 on January 10, 1957, at or about 6:00 o'clock p.m.

That after the docking operations were completed that vessel lay completely moored at that pier.

That at that time that vessel had displayed on its offshore stern area a standard size stationary sign-board type of warning of the propeller area and the danger to other craft of getting near that propeller [583] area and particularly the propeller on that vessel.

That in addition thereto there was overhanging that ship's side at or about the stern quarter on the starboard or offshore side the usual warning lights which were lowered to a point a few feet above the water in accordance with applicable regulations, and those lights were burning at all times material to this action.

That immediately after the "Finished With Engine" bell was received the engine room personnel, as was customary, started the turning engine or jacking engine on the Cotton State for the purpose of after-voyage conditioning of the vessel's engines and engine room machinery for their proper and usual care and protection during the dockside layup during the loading operations of the vessel.

That with the setting in motion and operation of such turning gear the propeller of the vessel began a very slow-rate revolution, which was at a rate in keeping with the customs and usages of vessels of this type, which is a turbine engine vessel.

That this slow revolving of the propeller of the Cotton State was accomplished by the proper and desired functioning of the turning gear.

That while the Cotton State was so lying at [584] rest at that dock as a completely and properly moored vessel under those circumstances, there came along within a few minutes afterwards—perhaps within not more than five or six minutes or thereabouts afterwards—the tug Lea Moe towing two lumber laden barges, the E-25 as the leading barge and the E-15 as the following or rear barge,

and as that tug and those barges passed the stern area and propeller area of the Cotton State they were making preparations for tying up alongside the Cotton State for the purpose of discharging the lumber cargo from both of those two barges.

That the master of the towing tug proceeded inward into the slip on the offshore side of the Cotton State until he reached a point considered by him as a suitable place to stop the forward movement of the tug and tow, and in that connection signaled to the chief mate or chief officer aboard the Cotton State that the tug and tow desired a mooring line from the Cotton State. At that time that tug had arrived at a point approximately under the midship house of the Cotton State, when the chief mate of the Cotton State undertook to pass down to the tug and tow a mooring line, which was passed by the mate down to the tugboat man, and that line was instantly engaged by one or more of the tugboat men in the service of the tug and tow to the offshore forward [585] stanchion of the leading barge, the E-25, the selection or determination of such place on the tug or tow for the fixing of that line being determined by those aboard the tug and tow.

That only one mooring line was passed to the tug and tow from the Cotton State, that one being all of the moorage line aid called for by those on board the tug and tow.

That after such attaching of that single mooring line, the tug, while negligently attempting to change the E-15 to the leading, and the E-25 to the

following or rear, position in the towing formation and to complete the tug's towing operation, unloosened its towing line, and the rear or following barge E-15 was negligently allowed by the tug to drift and it drifted under the stern counter and into and collided with the slowly revolving propeller of the *Cotton State*, at least two or more of the propeller blades separately striking separate blows on the after inshore or left side of the barge E-15, resulting in severe and extensive damage to that barge and resulting in danger of its sinking, but the tug, after the barge E-15 received such injuries and damages, towed the E-15 to a place of comparative safety away from the revolving propeller of the *Cotton State*.

That thereafter by automatic functioning the [586] power unit of the turning gear stopped as a result of the propeller striking the barge E-15.

That there is not sufficient evidence before the Court to support a finding of certain fact as to when, with reference to the collision of the barge with the propeller, the turning gear stopped functioning.

That at the time the tug and tow were passing the propeller area there were no navigation or other lights on the rear or following barge E-15 and there was no lookout on that barge.

That the tug and tow were at fault and were negligent in causing and contributing to cause the collision of the barge E-15 with the *Cotton State's* slowly revolving propeller in the following particulars:

That the tug and tow, being the moving vessel, collided with the revolving propeller of the moored ship;

That the tugboat operator and the tug and the tow were negligent in failing to place and assist in placing and seeing that there was placed a navigation light upon the after end of the barge E-15;

That the tugboat operator and the tug were negligent and at fault for not having a lookout posted on the after end of the barge E-15.

That these omissions and acts on the part of [587] the tug operator and tug did proximately cause and/or did proximately contribute to causing the collision of the barge E-15 with the revolving propeller of the Cotton State.

That the barge E-15 and its owners were at fault and negligent in not providing navigation lights on the after end of the barge E-15; that the evidence in this case shows neither that the absence of such barge lights did not cause the accident and resulting injury and damage to the vessel's propeller nor that such failure to have such barge lights in use could not have caused or contributed proximately to cause such injury and damages.

That the Cotton State was in all respects a completely moored vessel at the time of the occurrence of the accident and that what it was doing with respect to operating its turning gear was in harmony with due and ordinary care for its own safety and for the safety of other vessels lawfully and prudently using and navigating the waters at and about the propeller area of the Cotton State.

That the Cotton State was not negligent or contributorily negligent in any material respect on account of any omission or commission on the part of the Cotton State respecting the occurrence of the [588] accident and its resultant damage here in question.

That the tug and tug operator jointly and severally were at fault on account of the matters and things connected with such accident, with respect to their relationship and the interrelationship between such tug and tug operator on the one hand and the Steamship Cotton State and its owner and operator upon the other hand.

That the barge owners and the barge E-15 were at fault in the particulars which the Court has already pointed out, and that so far as concerns the relationship of such barge owners and barge E-15 on the one hand and the Steamship Cotton State and its owner and operator on the other hand, the barge E-15 was, and the Cotton State was not, negligent or at fault with respect to the accident resulting in the damage sustained by the barge E-15.

That the libelant States Marine Corporation of Delaware, a corporation, is entitled to recover of and from the respondents and each and all of them the full amount of libelant's damages sustained as set out in the admitted facts of the pretrial order in this action.

That the respondents, The Pacific Tow Boat Company and the barge E-15 and/or owners, re-

cover nothing [589] from the libelant or cross-respondent herein.

That the libelant be awarded its taxable costs herein incurred against respondents and cross-libelants.

Are there any other issues or contentions set out in the pretrial order not here disposed of?

Mr. Crutcher: Yes, your Honor, the claim by Eclipse Lumber Company to recover its loss from Pacific Tow Boat Company.

The Court: From such preponderance of the evidence the Court finds, concludes and decides on that issue that The Pacific Tow Boat Company was negligent in the operation of the tug and tow in negligently failing to prevent the barge E-15 from colliding with the Cotton State's propeller; that as between The Pacific Tow Boat Company on the one hand and the E-15 and the latter's owners, the co-partnership Eclipse Lumber Co., on the other hand, the obligation of The Pacific Tow Boat Company was to furnish a crew and ordinary navigation lights for the E-15, but it negligently failed to do so; and that the owners of the barge may recover of and from The Pacific Tow Boat Company for all of Eclipse Lumber Company's damages sustained in this action and the taxable costs of such Lumber Company.

All other contentions inconsistent with the Court's findings, conclusions and decision and all other [590] issues are rejected and overruled and are disposed of by the Court's foregoing orally announced decision.

(Thereupon, at 5:30 o'clock p.m., Tuesday, December 2, 1958, an adjournment herein was taken.)

Reporter's Certificate

I, George F. Cropp, the undersigned, do hereby certify that I am an Official Court Reporter for the above-entitled Court, and that as such was in attendance upon and reported the hearing of the foregoing cause.

I further certify that the foregoing Statement of Facts, consisting of Volumes Nos. I, II and III, is a full, true and correct record of the proceedings had upon the hearing of said cause.

Dated at Seattle, Washington, this 26th day of January, 1959.

/s/ GEORGE F. CROPP,
Official Court Reporter.

[Endorsed]: Filed February 6, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, John A. Burns, Clerk of the United States District Court for the Western District of Wash-

ington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Designation of Counsel, I am transmitting herewith as record on appeal in the above-entitled cause, the following original papers in the file of the cause, to wit:

1. Libel in Rem and in Personam, filed Jan. 28, 1957.

5. Appearance of Bogle, Bogle and Gates as proctors for The Pacific Tow Boat Co., filed Jan. 31, 1957.

7. Appearance of Graham, Green and Dunn as proctors for co-partners doing business as Eclipse Lumber Co., filed Feb. 1, 1957.

8. Answer of The Pacific Tow Boat Company, filed Feb. 6, 1957.

10. Marshal's Return on Monition and Attachment, M/V Lea Moe, filed Feb. 6, 1957.

11. Marshal's Return on Monition and Attachment, Barge E-15, filed Feb. 6, 1957.

12. Release and Cost Bond with Marshal's return thereon (M/V Lea Moe), filed Feb. 6, 1957.

13. Release and Cost Bond with Marshal's return thereon (Barge E-15), filed Feb. 6, 1957.

18. Answer of E. W. Stuchell, et al., filed Oct. 28, 1957.

19. Substitution of proctors, Bogle, Bogle and Gates appearing in place of Graham, Green and Dunn for co-partners doing business as Eclipse Lumber Co., filed Feb. 28, 1958.

20. Cross-Libel of E. W. Stuchell, et al., filed Feb. 28, 1958.

21. Answer of Cross-Respondent States Marine Corporation of Delaware to Cross-Libel, filed March 12, 1958.

36. Pretrial Order, filed Nov. 21, 1958.

44. Findings of Fact and Conclusions of Law, filed Dec. 10, 1958.

45. Final Decree, filed Dec. 10, 1958.

49. Notice of Appeal by Pacific Tow Boat Company and E. W. Stuchell, et al., d/b/a Eclipse Lumber Co., filed Dec. 18, 1958.

51. Order Fixing Security, filed Dec. 29, 1958.

52. Supersedeas Bond of Appellants, filed Dec. 29, 1958.

54. Statement of Facts in three volumes (54a, 54b and 54c), filed Feb. 6, 1959.

55. Order for transmittal of exhibits, filed Feb. 9, 1959.

56. Statement of Points on Appeal of Pacific Tow Boat Co. and E. W. Stuchell, et al., d/b/a Eclipse Lumber Co., filed Feb. 9, 1959.

57. Designation of Contents of Record on Appeal of Pacific Tow Boat Co. and E. W. Stuchell, et al., d/b/a Eclipse Lumber Co., filed Feb. 9, 1959.

58. Appellee's Supplemental Designation of Record on Appeal, filed Feb. 10, 1959.

Libelant's Exhibits 1 through 16 inclusive and Respondent's Exhibits A-1 and A-2.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellants for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5:00; and that said amount has been paid to me on behalf of the Appellants.

Witness my Hand and official seal this 10th day of February, 1959, at Seattle, Washington.

[Seal]

JOHN A. BURNS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 16374. Pacific Tow Boat Company, E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr.; M. A. Wyman, D. E. Wyman and M. H. Wyman, co-partners doing business as Eclipse Lumber Co., Appellants, vs. States Marine Corporation of Delaware, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: February 11, 1959.

Docketed: February 20, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

**United States Court of Appeals
For the Ninth Circuit**

THE PACIFIC TOW BOAT COMPANY, a corporation; and
V. E. STUCHELL, WILLIAM D. CARPENTER, HARRY W.
TUCHELL, JR., M. A. WYMAN, D. E. WYMAN and M. H.
WYMAN, Co-Partners Doing Business as Eclipse
Lumber Co., *Appellants*,

vs.

STATES MARINE CORPORATION OF DELAWARE,
a corporation, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANTS' BRIEF

BOGLE, BOGLE & GATES

CLAUDE E. WAKEFIELD

EDWARD C. BIELE

Proctors for Appellants.

03 Central Building,
Seattle 4, Washington.



United States Court of Appeals For the Ninth Circuit

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United States Court of Appeals

For the Ninth Circuit

THE PACIFIC TOW BOAT COMPANY, a corporation; and W. E. STUCHELL, WILLIAM D. CARPENTER, HARRY W. STUCHELL, JR., M. A. WYMAN, D. E. WYMAN and M. H. WYMAN, Co-Partners
Doing Business as Eclipse Lumber Co.,
Appellants,

vs.

STATES MARINE CORPORATION OF DELAWARE,
a corporation,
Appellee.

No. 16374

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANTS' BRIEF

JURISDICTION

This is a collision case brought in admiralty in the United States District Court for the Western District of Washington, Northern Division. States Marine Corporation of Delaware (States Marine) libeled the tug LEA MOE and the scow ECLIPSE No. 15 (No. 15) *in rem* and their respective owners, The Pacific Tow Boat Company (Pacific) and E. W. Stuchell, *et al.*, a partnership doing business as Eclipse Lumber Co. (Eclipse), *in personam* for damages to its steamer COTTON STATE (Libel, Tr. 3). Respondents appeared, claimed their vessels, and each answered pleading a general denial

and affirmative fault on the part of libelant (Pacific's Answer, Tr. 9; Eclipse's Answer, Tr. 19). Thereafter Eclipse filed its cross libel *in personam* against libelant for damages to the scow No. 15 and her cargo (Cross Libel, Tr. 26). The District Court had jurisdiction of the libel and cross libel. 28 U.S.C. §1333.

Final decree of the District Court in favor of libelant was entered on December 10, 1958 (Decree, Tr. 65). Appellants thereafter gave Notice of Appeal (Tr. 69) and filed appropriate security (Tr. 71) within ninety days after entry of the decree. Jurisdiction of the appeal is sustained. 28 U.S.C. §§1291, 2107.

CONCISE STATEMENT OF CASE

This litigation arises out of a collision between the propeller of the steamer COTTON STATE while slowly rotating on its turning or jacking gear and the lumber laden and "dumb" scow No. 15 at 1845 hours on January 10, 1957, at Everett, Washington. Five minutes before the collision the tug LEA MOE had brought two scows, No. 15 and ECLIPSE No. 25 (No. 25), close-coupled and in tandem to make an integral unit, along the starboard side aft on the COTTON STATE which had just berthed port side to and bow in at the Port Dock. A mooring line from the COTTON STATE had been placed leading from amidships on the steamer to the outboard forward corner of the No. 25 in substitution for the tug's towing hawser. Thereafter the No. 15, still close coupled to the No. 25, drifted inboard under the COTTON STATE's counter and was impaled on the propeller. The tug LEA MOE proposed to shift the No. 15 from her po-

sition aft on the COTTON STATE after the mooring line was substituted for her tow line, but while she maneuvered to do so collision occurred. Damage to the scow was on the port side about forty feet forward from her after end.

The COTTON STATE required drydocking and replacement of the propeller, three blades having been damaged. The No. 15 was holed, causing her to dump her cargo and to require extensive hull repairs. States Marine sued No. 15 and her owner, Eclipse, and the LEA MOE and her owner, Pacific, for damages ultimately stipulated at \$22,500.00. Eclipse filed a cross libel against States Marine only for agreed damages of \$9,985.25.

The trial court, the Honorable John C. Bowen, gave libellant its damages in full against both Pacific and Eclipse while denying Eclipse's cross libel against States Marine. Eclipse, however, was awarded recovery over from Pacific for its scow and cargo damages and anything it might have to pay States Marine. Both Pacific and Eclipse appeal with regard to the award of any damages to and the dismissal of Eclipse's cross libel against States Marine.

The issues raised on appeal are these:

1. Was this a matter to be decided primarily by application of admiralty's presumption of fault against a moving vessel which strikes a stationary one?
2. Did those on the COTTON STATE, which was the consignee of the scows, exercise proper seamanship under the circumstances? Without protest, they actively par-

ticipated in tying up the scows and at the same time started up the propeller which subsequently damaged the No. 15 by striking her over an extended length of time thereby not avoiding or minimizing damage.

3. Was the tug LEA MOE negligent after the mooring line in substitution for its towing hawser was secured from the COTTON STATE to the scow No. 25 to which No. 15 was close-coupled making them one integral unit?

These questions arise generally on the whole record, and in more detail are raised by appellant's Statement of Points on Appeal (Tr. 74) and the following:

SPECIFICATION OF ERRORS

1. The basic disposition on the merits by simply applying the presumption of fault against a moving vessel which strikes a stationary one (Opinion, Tr. 580, 581, 584, incorporated in Finding 16(a) and 18, Tr. 60, 61) ignored the evidence and was contrary to legal principle.

2. The trial court failed to apply a proper standard of care on the part of those on the COTTON STATE when it made a "finding of fact" that they were not negligent or contributorily negligent (Finding 18, Tr. 61, as followed in Conclusion 2, Tr. 62).

3. The finding that after the ship's line was attached to the No. 25 and the tug's towing hawser was taken in those on the tug allowed the No. 15 to strike the propeller was clearly erroneous (Opinion, Tr. 583, incorporated in Finding 14, Tr. 59).

ARGUMENT

Summary

1. The measure of the trial court's decision on the merits is no more than application of admiralty's presumption of fault in favor of a moored vessel damaged by one under way. But the presumed lack of control of a vessel which strikes another at rest does not apply when for perhaps five minutes before collision the former vessel was safe and controllable by those on the latter which was the consignee of the former and where the officers and crew of the stationary vessel actively participated in handling and tying up the ultimately moving vessel. With respect to the relations between COTTON STATE on one hand and the tug and scows on the other the trial court (Opinion, Tr. 585, incorporated in Conclusions 2, 3, 4, Tr. 62) failed to appreciate the "relationship of the parties in their entirety" as required by authority. *New York Trap Rock Corp. v. Christie Scow Corp.*, 2 Cir., 162 F.(2d) 624, 627.

2. In a case tried to the court a "finding" that a party is not negligent or contributorily negligent is not a finding of fact which must be accepted unless "clearly erroneous." It is a conclusion of law as freely reviewable as any conclusion of law strictly so called. *Barbarino v. Stanhope S. S. Co.*, 2 Cir., 151 F.(2d) 553; *Kreste v. United States*, 2 Cir., 158 F.(2d) 575; *New York, New Haven and Hartford R. Co. v. Grey*, 2 Cir., 240 F.(2d) 460. Therefore, the appellate court should make those findings which the trial court did not and to them apply the proper legal standard of care. *States*

Steamship Company v. United States, 9 Cir., 259 F. (2d) 458. "The proper standard of care is a question of law." *The C. W. Patterson*, 2 Cir., 70 F. (2d) 712.

3. No. 15 and No. 25 were at all times before collision close-coupled forming one integrated unit. When the COTTON STATE's line was substituted for the tug's towing hawser they were safe and under control by those on the COTTON STATE. From then until after collision the tug did not impart any motion to the scows to cause the No. 15 to drift under the steamer's counter and to collide with the propeller.

Facts About the Vessels

The COTTON STATE is a C-2 type vessel. Exhibit 5 shows her profile, hull outline, and general arrangements. Undisputed important particulars are: a beam of 63.1 feet (Tr. 36); propeller diameter—19.5 feet (Tr. 117); propeller tips inboard from starboard side of hull—21.8 feet. She had a four-bladed propeller which was rotated on the jacking gear in an astern, or counter-clockwise looking from astern, direction at a speed of one revolution in 7 or 8 minutes (Tr. 38). Rotation of the propeller always results when the jacking gear is operated. The jacking gear consists of an electric motor and appropriate gears which when operated rotates the turbine to cool or warm its blades uniformly. Three of the four propeller blades were badly bent (Exs. 9-15, Tr. 254). The tip of one blade was missing before the casualty (Ex. 15, Tr. 263).

The No. 15 and No. 25 are square ended, wooden cargo scows. Each is 110.4 feet in length and 37.9 feet in

breadth (Tr. 36). On the four corners of each scow are stanchions used for fastenings. Those on the stern of the No. 25 and the bow of the No. 15 were used to close-couple the two scows into an integral unit (Tr. 37, 543). The stanchion on the No. 25's forward starboard corner was used for the tug's towline (Tr. 37), and in turn for the substituted tieup line passed from the COTTON STATE (Tr. 546).

Each scow was loaded with lumber. McLaughlin, the COTTON STATE's chief officer, described the lumber on each scow as 10 to 14 feet high, stowed out to the sides and in about 10 feet from each end, and level on the top so he could see the cargo (Tr. 132, 143, 159). Captain Keezer of the LEA MOE was in substantial agreement (Tr. 442). Damage to the No. 15 is shown on Exhibit A-1. It consisted of two gashes (Tr. 433). They were on the port side about forty feet forward of the stern or thirty feet forward of the end of the lumber cargo.

The tug LEA MOE is a diesel powered vessel of 265 horsepower, 42 gross tons, 28 net tons, registered length of 60.9 feet and breadth of 18.8 feet. She is equipped with pilot house controls of the main engine (Tr. 36). Her normal complement for towing jobs such as involved herein is three men (Tr. 510, 568).

Chronology

1835—COTTON STATE finished with engines (deck and engine room log and bell books, Exs. 1, 2, 6, 8). Ship tied up (Tr. 185).

1838—Kane inspection aft made three minutes after he boarded COTTON STATE at 1835. Observed leading scow (No. 25) midship and trailing scow (No. 15) breasted off from the stern about 25 to 30 feet (Tr. 361).

1840—Jacking gear engaged (engine room log, Ex. 6). Jacking gear started up 4 to 5 minutes after finished with engines per Pilar (Tr. 398, 402), 3 to 5 minutes per Green (Tr. 386). Jacking gear engaged without communication to deck because “assumed” everything clear (Tr. 368, 402, 406).

1840—Tug LEA MOE brought lumber scows alongside (deck log, Ex. 1, Tr. 185).

Three to four minutes between substitution of lines and collision (Tr. 470, 550). Pilar in engine room “five to ten minutes” after having engaged jacking gear (Tr. 406). No indication of trouble before Pilar (Tr. 407) or Green (Tr. 372) left engine room.

1845—Collision (deck and engine room logs (Exs. 1, 6, Tr. 185).

Propeller striking barge for three to four minutes without effort to shut off (Tr. 298).

1847—Kane entered engine room and during inspection found jacking gear out (Tr. 324).

Presumption of Fault Ignored Evidence and Contrary to Legal Principle

Admiralty's presumption against a moving vessel striking a stationary one is no more than application of the doctrine of *res ipsa loquiter*. Presumed lack of control on the part of the drifting vessel is the basic ingredient. *The Buffalo*, 2 Cir., 56 F.(2d) 738; *Burns Bros. v. Long Island R. Co.*, 2 Cir., 176 F.(2d) 406. When a scow tied to an oceangoing vessel strikes the latter's propeller, inquiry always concerns who manipulated the mooring of the scow. Illustrative cases imposing liability upon a party guilty of improper exercise of control of mooring lines are:

United States v. Seas Shipping Co., E.D.N.Y.,
92 F.Supp. 902;

*Rusted v. Nicaragua Mail Steam Navigation
& Trading Co.*, S.D.N.Y., 56 Fed. 1022;

Hektor, D. Md., 1935 A.M.C. 336.

In this matter control was in the hands of those on the COTTON STATE and they should explain how the scows drifted.

a. Substitution of Line

Scows No. 15 and No. 25 were towed alongside the COTTON STATE by the LEA MOE towing on a short hawser extending for a distance of eight to ten feet over the stern of the tug to where it was attached to a stanchion at the forward starboard corner of No. 25. There were short coupling lines fastened between the two corner stanchions aft on the No. 25 and extending to the two

forward corner stanchions on the No. 15 which was the after scow in the tandem bow. The two scows were close-coupled with a foot or so clearance between them (Tr. 37). So secured the scows formed a single integral unit (Tr. 522, 527, 528). The manner in which they were lashed prevented kinking or wobbling (Tr. 444). They were still close coupled in a single unit after collision (Tr. 153, 221, 230, 472).

After the scows were brought alongside the COTTON STATE one of the steamer's mooring lines was passed to the tug's deckhand on the No. 25 (Tr. 546). This was customary and expected (Tr. 413-414). The tug's deckhand, Hafey, secured the mooring line on the same stanchion as the tug's towing hawser, but under the latter. He secured the mooring line with "a round turn around the stanchion and tied it with a bowline" (Tr. 546, 563). After the mooring line was fastened on the No. 25 the COTTON STATE's boatswain and chief officer took control of it and tightened it on a midship cleat on her cabin deck (Point 1, Exh. 5, Tr. 204; Tr. 140). There was never any protest from the COTTON STATE as to the manner of tying up (Tr. 468).

When the slack was out of this mooring line the tug's deckhand cast off the towing hawser without disturbing the former (Tr. 547). Thereafter the tug maneuvered away from the scows to take position to move the No. 15 forward on the COTTON STATE. Analysis must start with recognition that the mooring line was substituted for the tug's towing hawser (Tr. 179, 181). McLaughlin agreed:

“Q. So in effect your line had been substituted for the tug’s line, had it not?

A. Well, if you want to call it that, sir.” (Tr. 171).

It was an event intervening between what went on before and what was to occur thereafter.

b. Participation by Crew of Consignee Steamer

The mooring line was affixed on the “usual” place on the No. 25 (Tr. 474). It “was perfectly all right” according to Chief Officer McLaughlin who acquiesced and participated in the way the scows were to be tied up (Tr. 172). He recognized what was going on:

“Q. (By Mr. Biele): During the time that these scows were brought alongside and until the line was secured by you and the boatswain in substitution for the tug’s line, did you make any protest or any objection to the way in which it was being done?

A. No, sir.

Q. You stood mute? A. Sir. (119)

Q. You stood mute? You didn’t say anything?

A. No.” (Tr. 178-179)

c. Scows Safe and at Rest

After the substitution of the line the two scows were safe. They were at rest (Tr. 141, 475, 559). McLaughlin’s only complaint was that the scows could not be operated (Tr. 172). He was not thinking of danger because he “didn’t see the barge underneath the stern or anything” (Tr. 173). Dusevoir recalled the situation thus:

“Q. Well, did you see the scows in any trouble before you finished securing the line?

A. The scows themselves, no.

Q. Then is it a fair statement that at the time you got the line secured the scows were still in good shape? A. Yes, sir.” (Tr. 213).

All of the foregoing was five minutes before the scow struck the propeller (Tr. 185).

d. Explanation for Collision

The COTTON STATE’s mooring line held the two scows (Tr. 228). Dusevoir after securing the mooring line left it unattended so he was unable to state what had happened to it thereafter (Tr. 212). We do know the end on the No. 25 was still intact following the accident (Tr. 563). McLaughlin agreed that if the mooring line were not controlled it would allow the scows to drift:

“Q. This line that was substituted for the tow-line when tightened as you have described would keep the forward scow in towards the ship, would it not, if it were tightened? A. Yes.

Q. And if it were slacked off it would allow the scows to drift astern or out from the ship, would it not? A. Yes, it would have if it were.” (Tr. 179).

Captain Keezer from the tug was in accord:

“We used the line there because it serves the double purpose of holding the scow from going endways and also holds it tight against the ship.” (Tr. 475).

The only possible explanation for collision was Captain Keezer’s. As an integral unit the scows were allowed

by the COTTON STATE's crew to pivot on the side of the ship when the mooring line was not controlled (Tr. 508-510). A slight wind blowing toward the steamer's stern was the motive force (Tr. 468). If the scows were held by the mooring line between the steamer and the No. 25 the distance between the No. 15 portside and the propeller tips was about twenty feet for when the tug took her line aboard the forward scow was tight against the starboard side amidships (Tr. 510). Examination of Exhibit 5 showing the hull outline of the COTTON STATE readily confirms this. In the words of Fulmer who was closest to the stern area :

“Q. Did the trailing barge or the aftermost barge, was that in close alongside the offshore side of the COTTON STATE when you first observed it?

A. The barge that was the trailing barge, as you call it, was not in close, but she—after the boatswain had made this fast she began to come in, and the tug went to get it and move it. Do you understand what I mean?” (Tr. 221-222).

Further confirmation that the scows drifted while attached to the steamer is found in the fact that after the No. 15 was cleared the No. 25 was further back on the COTTON STATE than she was when the substitution of the line was effected (Tr. 505, 558).

2. Standard of Care Exercised on Cotton State Was Negligence

a. Cotton State's witnesses able to see everything

Appellants do not concede the tug or scows were guilty of any fault with respect to lights or lookout because it was after technical sunset, but assuming for sake of

argument that they were, libellant should get no comfort. *States Steamship Co. v. Permanente Steamship Corp.*, 9 Cir., 231 F.(2d) 82, 86, held it not the purpose of the law "to establish as a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable or remote."

In *The Redwood*, 9 Cir., 81 F.(2d) 680, 687, this court found that a vessel operated with defective lights was not at fault because the other vessel saw her "when she was about half a mile away and any purpose served by the light could not have aided more than an actual view of the vessel." Subsequently *Van Camp Seafood Co. v. Di Leva*, 9 Cir., 171 F.(2d) 454, arose over a matter wherein it was contended a vessel was guilty of statutory faults because navigated with improper lookout and lights. By way of answer this court held neither the absence of a masthead light nor the questionable conduct of a lookout could possibly have contributed to the collision when the complaining vessel at all times saw the other one. The principle of these cases control here where those on the COTTON STATE saw, accepted, and participated in tying up the scows alongside without protest.

The trial court found that visibility was "good" but technically after sunset and dark (Finding 11, Tr. 57). Because the two scows were not lighted and no one was aboard the No. 15, she and the LEA MOE were condemned for lack of lights and a lookout (Finding 16, Tr. 59).

Without comment the COTTON STATE was absolved of fault, presumably because her witnesses could not see what was going on directly under their eyes. This, it is submitted, is absurd. On their own testimony all of the libellant's witnesses clearly saw, or could have seen, the situation presented from start to finish. Those who saw the scows did nothing. The others stand self-convicted of improper seamanship. See *The Achilles*, S.D.N.Y., 291 Fed. 636.

Kane, libellant's night engineer, boarded the COTTON STATE at 1835 hours. About three minutes later he took a look around on the steamer's stern. He then saw the two scows, the trailing one being "offshore perhaps twenty feet" (Tr. 330). Further on he testified, "the tug and the first barge were in the midship area * * * *the trailing barge was breasted off the vessel*. That means it was away from the vessel * * * about twenty-five to thirty feet" (Tr. 360-361). (Emphasis added). We must assume Kane saw no danger or he would have taken avoiding action (Tr. 360-361). His sighting is particularly significant because the LEA MOE landed the scows with the No. 15 about twenty feet outboard of the propeller tips; and if the mooring line from the ship was held the No. 25 would have remained against the COTTON STATE's side keeping the No. 15 breasted away from the propeller (Tr. 507-510).

Fourth Mate Judy working on the bridge "just looked out and I seen them (tug and scows) coming and I kept on with my work" (Tr. 98). When he ties up scows he does not rely upon a crew member to watch clearance in the propeller area—he does it himself (Tr. 105).

COTTON STATE'S deck log (Exh. 1) notes the matter was "witnessed by chief mate." He conceded "there was plenty of illumination that night" (Tr. 160) and he saw the scows coming alongside (Tr. 417). He confided to Boltz, "I seen a barge come into the propeller" (Tr. 310). At his discovery deposition McLaughlin, who was at least ten feet above the top of the lumber cargoes (Tr. 158), testified as to visibility and need of lights:

"Q. In January what was the condition of the daylight? A. Oh, it was day still.

Q. It was still daylight?

A. Yes. It was cloudy that day. I mean the sun wasn't shining.

Q. At the time of the accident it was light outside? A. Oh, yes.

Q. Or was it dark?

A. It was light; light enough you could see. It was getting dusk, you know.

Q. Did you have to have any lights, or were you using any lights for this procedure of pulling these scows alongside? A. No, sir." (Tr. 161)

On direct examination at the trial McLaughlin testified:

"Q. By the way, what was the condition of the light or darkness at that time?

A. Well, it was very dark at that time, but you could see everything around by the lights on the ship.

Q. What was the condition of the visibility?

A. Well, I could see good, sir, from the lights.”
(Tr. 132)

After being reminded of his discovery deposition testimony, McLaughlin on redirect examination responded to his employer’s proctors questioning:

“Q. Now, Captain, will you tell us again what your testimony was as to the hour of sunset on January 10th?

A. Well, I said it was daylight at that first testimony, and I will say that I found that I was incorrect at that (127) time, but I was referring to the visibility that I could see then, because I could see the top of the tug away from it and you could see everything around at that time.” (Tr. 185)

Boatswain Dusevoir was candid:

“Q. Well, you had a birdseye view of the scow?

A. Yes, sir.

Q. From where you were standing could you see back aft to the stern of the ship, too?

A. Yes” (Tr. 212).

On redirect examination he let the cat out of the bag:

“Q. From the position that you described in answer to a question by Mr. Biele at the accommodation ladder looking down on the lumber on the scow was it possible for you to determine where the stern end of the tow was (159) with reference to the stern of the COTTON STATE?

A. I think it may have been possible but I didn’t do it, sir.” (Tr. 213)

The third member of libelant’s crew on deck was Fulmer stationed in the vicinity of No. 4 hatch “stand-

ing by the rail watching what was going on" (Tr. 206). He testified that he was "in a position" to see the warning board with the red light suspended from the railing on deck before the No. 15 drifted into contact with it and thereafter further inboard to the propeller (Tr. 226). His other testimony on sighting and visibility was:

"Q. All right. Now, while you were in that position, did you (165) observe any tug and barges approaching the offshore side of the vessel?

A. Certainly I observed them. That's my job." (Tr. 218).

"Q. From where you were could you see back towards the propeller area?

A. I could see back—Judge, your Honor—

The Court: That is not required, Mr. Fulmer.

A. O.K.

The Court: Just answer the question, and when you have finished that it is his responsibility to ask another.

A. Yes, I can see." (Tr. 230)

b. Propeller started without clearance from lookout

Libelant's deck and engine room logs record that at 1840 hours the jacking gear was engaged and the scows were brought alongside. This coincidence puts it on the horns of a dilemma. Either the scows were then safe and under the control of the COTTON STATE for some time before collision as we contend, or if any danger then existed, the steamer stands self-condemned for starting up the propeller without definite assurance about the condition of clearance at her stern area or for

not sending immediate word to the engine room to stop the propeller if it was menaced.

Green and Pilar, who engaged the jacking gear, testified:

“Q. After you get the ‘Finished with Engines’ bell, how soon is the turning gear or jacking gear engaged?”

A. In four or five minutes it is engaged. If the ship is coming in to port, the Second Mate is back aft, and he usually checks to see that everything is clear. If there is anything there, we know almost immediately. We will know immediately that it isn’t clear and we wait for the Clear—the moment we get the ‘Finished with Engines’ and we don’t hear anything from the bridge, we engage it immediately after ‘Finished with Engines’ which is three or four minutes.” (Pilar Tr. 402)

“Q. When you engaged the turning gear at this time did you inform any of the deck officers that you were engaging the turning gear?”

A. No.

Q. Before the turning gear was started had you determined whether there were any barges or scows or vessels in the vicinity of the propeller?

A. No.

Q. Had you determined whether there was a watch maintained on the stern to see if everything was clear in the vicinity of the propeller?

A. No.” (Green Tr. 367-368)

Legally the failure of those on the COTTON STATE to look astern in order to determine the condition of clearance or likelihood of damage before starting the pro-

PELLER was negligence. *The Seaboard No. 63*, E.D. N.Y., 69 F.Supp. 246; *Liberty*, E.D. Pa., 1936 A.M.C. 55; *Nounes v. United States*, S.D. Texas, 83 F.Supp. 11.

Several of the witnesses recognized the need for definite clearance from the deck before the propeller was started up. Knowles, a marine surveyor used by both sides, described the practice of prudent seamen "is that you get permission from the bridge. You are notified that the stern area is clear" (Tr. 426-427). Boltz, COTTON STATE's chief engineer, explained that the deck department notified those in the engine room "when they start the engine they have to notify us that everything is clear—they always do" (Tr. 302). Further on Boltz testified:

"Q. I think I have asked this before, but before you start the jacking gear no one from the engine room comes up to look at the propeller, you rely on the deck department?

A. Sure, because there is a licensed deck officer in the vicinity of the stern to notify us in case there is any obstruction in the vicinity of the propeller.

Q. And you depend on him?

A. I certainly do. He is a qualified man." (Tr. 306-307)

Kane was in accord:

"Q. Mr. Kane, in your experience in the Coast Guard and the Merchant Marine, have you observed the practice of checking the clearance conditions at the stern of a vessel before starting up the jacking gear? A. Yes.

Q. Do you know whether that was done on this occasion or not?

A. Before the jacking gear was engaged?

Q. Yes. A. No. [304]

Q. Such an inspection has a purpose, does it not, Mr. Kane?

A. Yes, it has.

Q. What is the purpose, if you know?

A. The purpose is to make certain that the propeller is clear and no obstructions are present to cause damage to the propeller." (Tr. 339)

c. No effort to avoid or minimize damage

Damage to three blades of the COTTON STATE's propeller meant its rotation continued for at least three and a quarter to four minutes after the initial striking of No. 15 (Tr. 298). Rotation stopped eventually when excessive electrical current required to turn the jacking gear's motor tripped the overload device. An explanation for this is found in Boltz' description of the damage as three blades "badly bent on the trailing edge and one was completely bent, the tip was bent down towards the hub" (Tr. 254). Apparently the obstruction was sufficient to "completely bend" the blade and to trip out the safety device when the last blow was struck.

Surveyor Knowles found the No. 15 showing she had been struck twice. Her after cut was the smaller of the two and caused less damage. It appeared to be the first cut, suggesting the scow drifted astern between strikings. In terms of cost of repairs the second cut added approximately 30 per cent to Eclipse's bill (Tr. 424-426).

What was done on the COTTON STATE to avoid or minimize damage? McLaughlin knew the propeller was going to be turned over (Tr. 174). When questioned about how long it would take to notify the engine room to stop the propeller's rotation he replied:

“It wouldn't be a matter of but a few minutes. A few seconds, rather, not minutes.” (Tr. 180)

According to Dusevoir there was no trouble “immediately” after tying up the substitute mooring line (Tr. 205). According to McLaughlin, “I don't know when I done it but I automatically turned around and looked aft, and at that moment I saw the barge—the lumber is all I could see, the top of the lumber jam under the counter” (Tr. 142-143). When he saw the after barge coming under the stern of the vessel he walked back to the stern area via his room. His time to reach the stern was, “I don't think it would take more than a minute, sir” (Tr. 144). Then standing on the stern and looking over the starboard side he observed the lines supporting a warning board and electric light wire between the ship and the lumber cargo. Considering that the propeller was slowly chewing up the scow over a period of perhaps four minutes, what followed is incredible for a chief mate who has served as master.

“Q. Now, what happened thereafter, Captain? What did you observe?”

A. Well, then I walk over to the port side to see if the light there was working, and that was in working condition. Then I just came back to the other side and I waited till the barge pulled—the tug pulled the barge away.” (Tr. 145)

“Q. Now, as the chief mate, do you have the authority to call up the engine room and tell them to stop the propeller if it’s rotating and something is menacing it?

A. Yes; if I saw it, I could do that.

Q. You didn’t do that on this occasion?

A. When I got aft the barge was against the hull of the ship, the lumber, and I didn’t call up. I didn’t think [121] of it.” (Tr. 180).

Fulmer, standing on the deck watching what was going on, described his conduct:

“Q. All right. When you saw this after scow go under or against the side of the ship you indicated you would have done anything to have helped, did you not? Did you do anything?

Q. I didn’t only indicate it, I would have.

Q. Well, did you do anything?

A. How am I going to get on the scow? I’m a sailor on deck. How am I going to get on that scow to do anything? I cannot do that. I can only take orders from them. I’ll give them anything they’d have hollered for.

Q. Did you know at that time that the propeller was turning?

A. I did not know the propeller was turning.

Q. Would you have called the engine room if you had known the propeller was turning?

A. I would have notified Mr. McLaughlin.

Q. You didn’t do that, however?

A. I did not know it was turning.” (Tr. 228-229)

Kane (Tr. 361), Kalem (Tr. 579), and Boltz (Tr. 302) all agreed if anything was observed menacing the

propeller they would expect the deck department to notify the engine room at once. Upon receipt of a telephone call it would have taken "a few seconds to run down and push the button" to stop the propeller (Tr. 299). Kane summed up almost two pages (Tr. 351-352) with this admission:

"Q. And if such an action were taken, it is quite possible the damage to the propeller could be minimized or perhaps eliminated entirely?"

A. If the obstacle of which you speak drifted in and he did see that and did telephone or communicate and ask to have the propeller stopped, it could be minimized." (Tr. 353)

This conduct of libelant's servants reflects the continuing improper care they exhibited to the No. 15 and to the safety of the COTTON STATE. If libelant's other faults were not the sole and proximate cause of this casualty, the failure to avoid or minimize damages to both the vessels is cause for admiralty's equal division of damages.

Southport Transit Company v. Avondale Marine Ways, 5 Cir., 234 F.(2d) 947, collecting and discussing the cases;

Segrave Transp. Co. v. Eskay Coal & Fuel Co., 2 Cir., 205 F.(2d) 257, holding a duty on the party to avoid the consequences of another's negligence arises even if the duty wrongfully thrust upon the party by another;

The East Indian, 2 Cir., 62 F.(2d) 242, 244, condemning officers in charge of the steamer who should have seen the danger of impending collision. "An officer should have readily seen and understood the danger."

3. Tug Did Not Cause No. 15 to Drift

We contend the evidence from libellant's deck witnesses does not establish the tug did anything to cause the No. 15 to drift into collision after substitution of the line. Dusevoir did not testify about the tug's movements. Neither did Fulmer except as to what occurred after he observed the No. 15 clearly drifting onto the propeller (Tr. 222). McLaughlin's contribution was:

“Q. After the substituted line was led from the ship to the scow, did you observe what the tug did after it took in its line?

A. No, sir.” (Tr. 182)

What the evidence shows is that after the tug took in her line from No. 25 she proceeded to shift aft to pick up the No. 15 which had been ordered placed forward on the COTTON STATE. The order for the switch of the two scows had been made by a person on deck of the COTTON STATE whose identity was never established (Tr. 133, 136, 163-167). This individual was not an employee of either appellant (Tr. 437, 517, 545, 569). Chief Officer McLaughlin, who stood “three to six feet” from this gentleman (Tr. 141) as the scows were brought alongside and overheard the order to change positions, never bothered to identify him (Tr. 122, 137, 163-167). To those on the tug this person gave full evidence of authority on behalf of the COTTON STATE (Tr. 494, 545). The chief mate acquiesced in all that he did (Tr. 123, 172).

Working from her towing position at the No. 25's bow the tug, after taking aboard her line, proceeded

ahead "to get away from the scow a little bit" and then backed out in the slip, maneuvering to change heading and to go back to the tail show (Tr. 470). From then until the trouble was observed the tug did not contact or touch the scows (Tr. 471, 525, 551). Actually the tug was twenty-five or thirty feet off from the No. 15 when she was first seen rocking and rolling (Tr. 471).

This court must examine the record to determine if the ruling of the trial court was clearly erroneous. *Titus v. S.S. Santorini*, 9 Cir., 258 F.(2d) 352. Some credible evidence must appear in the record to support a finding. Without it a reversal is required.

CONCLUSION

Appellants submit that after a review of the record and application of controlling principles this Court can only be "left with the definite and firm conviction that a mistake has been committed." *States Steamship Co. v. Permanente Steamship Corp.*, *supra*. The performance of those on the COTTON STATE was the sole and proximate cause of the damages to the propeller and the scow. It was no better than the "milk and water" conduct of the ship's officer condemned in *Weishaar v. Kimball S.S. Co.*, 9 Cir., 128 Fed. 397.

The decree in favor of States Marine and denying Eclipse's damages from the steamship owner should be reversed.

Respectfully submitted,

BOGLE, BOGLE & GATES

CLAUDE E. WAKEFIELD

EDWARD C. BIELE

Proctors for Appellant.

APPENDIX A

Table of Exhibits

<i>Description</i>	<i>Identified</i>	<i>Offered</i>	<i>Received</i>
ough deck log book from COTTON STATE....	89	112	112
hotostat of deck bell book from COTTON STATE	92	112	112
mooth deck log book from COTTON STATE	114	115	115
OTTON STATE's Chief Mate's sketch.....	125	127	128
-2 type vessel profile or capacity plan.....	198	199	199
ough engine room log book from COTTON STATE	237	237	238
mooth engine room log book from COTTON STATE	239	239	239
ngine room bell book from COTTON STATE.....	240	241	241
hoto, No. 2 blade of propeller.....	256	257	257
hoto, No. 1 blade of propeller.....	258	259	259
hoto, No. 3 blade of propeller.....	259	259	259
hoto, No. 2 blade of propeller.....	260	260	260
hoto, No. 2 blade of propeller.....	261	261	261
hoto, No. 2 blade of propeller.....	262	262	262
hoto, Nos. 1, 2 and 4 blades of propeller....	263	263	263
eck log from LEA MOE.....	486	487	487
<i>idents' Description</i>	<i>Identified</i>	<i>Offered</i>	<i>Received</i>
Photo, damage scow ECLIPSE No. 15.....	421	433	433
U.S. Coast Geodetic Survey Chart No. 6448	457	458	459

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CHARLES B. HOWARD

T. F. PAUL

Proctors for Appellee.

340 Central Building,
Seattle 4, Washington.



FILED

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T. F. PAUL

Proctors for Appellee.

40 Central Building,
Seattle 4, Washington.



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United States Court of Appeals

For the Ninth Circuit

THE PACIFIC TOW BOAT COMPANY, a corporation; and E. W. STUCHELL, WILLIAM D. CARPENTER, HARRY W. STUCHELL, JR., M. A. WYMAN, D. E. WYMAN and M. H. WYMAN, Co-Partners
Doing Business as Eclipse Lumber Co.,
Appellants,

vs.

STATES MARINE CORPORATION OF DELAWARE,
a corporation,
Appellee.

No. 16374

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEE

APPELLEE'S COUNTER-STATEMENT OF CASE

Since appellants' Statement of Case does not present to this Court all facts in evidence which are necessary to an understanding of the case, and to establish that the Findings of Fact are not "clearly erroneous," we set forth herewith a Counter-Statement of the Case and material facts pertinent thereto.

The steamer "COTTON STATE" arrived at and was moored port side to the Everett Port Dock at 1835 hours on January 10, 1957, bow in and with the stern about even with the outer end or face of the dock. In accordance with usual customary practices on turbine driven

vessels like the "COTTON STATE," the engineer on watch engaged a mechanism known as a jacking or turning gear as soon as the pilot and master were finished with the engines. This jacking or turning gear caused the shaft and propeller of the vessel to slowly turn at one complete revolution in every seven to eight minutes. The jacking gear was engaged at 1840 hours according to the ship's log records.

At about 1840 hours the tug "LEA MOE" came into the slip where the "COTTON STATE" was moored at the Port Dock. This tug was towing astern two heavily laden lumber barges, the barge No. 25 being the leading scow and the barge No. 15 being the trailing scow, and the two barges being coupled together with short manila coupling lines.

At 1840 hours, when the above operations were conducted, it was dark, official sunset at Everett having been at 4:29 P.M., equivalent to 1629 hours, or more than two hours before the time in question.

Signs warning tugs and other vessels of the propeller area and the danger to other craft were posted at the stern rail on the offshore side of the "COTTON STATE." There was an additional propeller warning board in place containing a flashing red light which was suspended by rope lines over the offshore stern area of the vessel to a point a few feet above the level of the water.

When the tug "LEA MOE" brought the two barges into the slip area before the accident she was displaying regulation towing and navigation lights but no lights

whatsoever were carried or burning on either barge No. 25 or barge No. 15.

There was no lookout or crew member aboard either barge No. 25 or barge No. 15 as the tug towed them into the slip along the offshore side of the moored steamer "COTTON STATE."

The master of the tug "LEA MOE" verbally and visually designated and pointed out to members of the crew on duty on the deck of the steamer "COTTON STATE" the point on the vessel to which he desired to have a mooring line secured between the ship and the leading barge and this request or direction was complied with by those persons on the "COTTON STATE." This resulted in one mooring line being extended from a point on the offshore midship section of the "COTTON STATE" to the offshore or starboard forward corner stanchion of the barge No. 25. Thereafter the tug released its towing hawser from the forward end of barge No. 25 and started to maneuver itself back toward the trailing barge No. 15 for the purpose of shifting that barge to a position further forward alongside the forward hatches of the steamer "COTTON STATE."

Before the tug "LEA MOE" had completed the above maneuver barge No. 15 drifted or sagged down under the stern counter of the "COTTON STATE" and came in contact with the slowly revolving blades of the propeller while engaged in the jacking or turning gear. This caused the damage to the propeller for which appellee sought relief in this action and also the damage and loss to barge No. 15 and its lumber cargo for which appellant Eclipse Lumber Company, as owner of the barge

No. 15, sought recovery in this action against both appellant Pacific Tow Boat Company and appellee States Marine Corporation of Delaware.

ANALYSIS OF APPELLANTS' SPECIFICATION OF ERRORS

Specification of Errors No. 1 is a mixed question of fact ("ignored the evidence") and law ("contrary to legal principle") having to do with the presumption of fault against a moving vessel which strikes a stationary one.

Specification of Errors No. 2 involves only factual questions wherein appellants contend the personnel on the "COTTON STATE" were negligent or contributorily negligent and that the trial court improperly made a "Finding of Fact" to the contrary.

Specification of Errors No. 3 is purely a factual question wherein appellants contend that the finding of the trial court that the activities of the tug and its personnel caused the barge to drift into collision with the propeller of the "COTTON STATE" was "clearly erroneous."

By the Final Decree (Tr. 65) entered by the trial court in this cause appellee States Marine was awarded its full damages against both appellant Pacific and appellant Eclipse. Appellant Eclipse was denied recovery against appellee States Marine for the damage to barge No. 15 but was allowed a recovery of its damages against co-appellant Pacific, including any amounts which it might be obligated to pay to appellee, States Marine, under this Decree.

It will be noted that the same proctors represent appellant Pacific as owner of the tug "LEA MOE" and appellant Eclipse as owner of the barge No. 15 in this cause and that no appeal has been taken from the portion of the Final Decree awarding Eclipse its full damages against co-appellant Pacific. This portion of the decree therefore becomes the law of the case insofar as the damages claimed by Eclipse are concerned. Having been allowed a complete recovery of its damages against Pacific, from which no appeal has been taken by either Eclipse or Pacific, there is no basis at law for Eclipse to appeal at this time with respect to its liability to appellee States Marine, for which it is completely protected by the unappealed portion of the decree allowing it full recovery against Pacific.

ARGUMENT

I. Applicability of McAllister Rule

A. The Trial Court Findings Are Not "Clearly Erroneous"

Since *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20, 1954 AMC 1999 was decided by the United States Supreme Court in 1954 all federal appellate courts in this country have consistently held that in admiralty cases they will not disturb the "Findings of Fact" of the District Court unless on a review of the entire evidence the Court of Appeals is left with the "definite and firm conviction that a mistake has been committed" and that such findings are "clearly erroneous."

This appellate court has on several recent occasions held that under the *McAllister* rule there can no longer be a trial *de novo* on an admiralty case appeal.

City of Long Beach v. American President Lines, Ltd. (1955) 223 F.2d 853, 855; 1955 AMC 1548;

Albina Engine and Machine Works, Inc. v. American Mail Line, Ltd. (1959) 263 F.2d 311, 314; 1959 AMC 417, 420;

U.S.A. v. Staples (1958) 256 F.2d 290, 293; 1958 AMC 728, 733.

Appellee agrees with the proposition expressed on page 26 of appellants' brief that this appellate court must examine the record to determine if the ruling of the trial court was "clearly erroneous." *Titus v. SS "SANTORINI"* (CA 9—1958) 258 F.2d 352, 353; 1959 AMC 1042. However, once this Court has satisfied itself that the test of the *McAllister* rule has been met by reason of some evidence in the record to support the findings of the trial court, then that portion of the appeal which specifically relates to an attack on the Findings of Fact should be at an end. In this case such an approach should dispose of Specification of Errors Nos. 2 and 3 at the outset of the appeal, leaving only the one issue of law as to whether the trial court improperly applied the presumption of fault against a moving vessel which strikes a stationary one under Specification of Errors No. 1.

B. Answer to Appellants' Argument Re Reviewability of "Negligence" Findings

Appellants contend under Specification of Errors No. 2 and the corresponding section of their argument (Br. 5) that the trial court incorrectly made "Findings of Fact" with respect to negligence or lack of negligence of each of the parties. Appellants contend that such "Findings" are in reality "Conclusions of Law" which are not subject to the restrictions of the rule of the *McAllister* case, *supra*, and are therefore as freely reviewable as any other true conclusion of law. In support of their contention appellants cite only three cases from the Second Circuit, including two cases which were decided several years prior to the Supreme Court decision in *McAllister v. United States*, *supra*.

Whatever may have been, or may now be the treatment and characterization of negligence or contributory negligence in the Second Circuit as either "Findings of Fact" or "Conclusions of Law" the rule in this Ninth Circuit seems to be clearly established that negligence and contributory negligence are proper matters to be dealt with in the Findings of Fact by the trial court.

Amerocean Steamship Company v. Copp (1957) 245 F.2d 291, 1957 AMC 749 was an admiralty case tried before the same U.S. District Judge as the present case and in which the parties were represented by the same firms of attorneys as the proctors in the present case. The trial judge, Honorable Bowen, D.J., made Findings of Fact and Conclusions of Law regarding negligence which were considered and approved by this

Court on appeal. After quoting the exact language of the trial court as to certain joint acts of *negligence* on the part of two of the parties to the action, this Court in footnote No. 9 of the opinion condemned the very practice which appellants now suggest should be used and had this to say:

“It is true this expression appears under the head of ‘Conclusions of Law.’ It is inartistic since *the whole sentence also contains a finding of fact. Proximate cause and joint and concurrent negligence are facts, not law.* Such questions in a proper case would be submitted to a jury. The unworkmanlike placing of the statement by counsel tendering the document does not render it less a finding of fact.”

Amerocean Steamship Company v. Copp
(1957) 245 F.2d 291, 294; 1957 AMC 749.
(Emphasis added)

In other recent admiralty cases this Court has similarly approved “Findings of Fact” regarding negligence of the parties or their representatives.

City of Long Beach v. American President Lines, supra;

Albina Engine and Machine Works, Inc. v. American Mail Line, Ltd., supra.

The Sixth Circuit has also approved of the practice of the trial court making “Findings of Fact” with respect to negligence and unseaworthiness.

Imperial Oil, Ltd. v. Drlik (1956) 234 F.2d 4,
1956 AMC 1862.

II. Applicability of the Pennsylvania Rule

In cases involving marine collisions it has long been the rule in this country that if one vessel has violated a statutory duty as to navigation it must prove that such violation not only did not but could not have contributed to cause the accident.

The Pennsylvania (1873) 19 Wall. (86 U.S.) 125.

This rule has been consistently followed in the Court of Appeals for the Ninth Circuit with respect to situations involving lack of proper navigation lights on vessels, including barges or scows.

N.A. Dredging Co. v. Cutler (1908) 162 Fed. 457, 459;

Port of Portland v. U.S. (1910) 176 Fed. 866;

Olympic-Magna (1932) 59 F.2d 697, 1932 AMC 1032, 1036.

The U.S. Supreme Court recently held that the rule as to absolute liability for violation of a statutory duty or regulation as to lights on a scow was applicable, even in a seaman's death case involving an explosion, although the statute or regulation violated was intended to prevent collisions rather than to prevent explosions.

Kernan, Admx. v. American Dredging Company (1958) 355 U.S. 426, 2 L.Ed.2d 382, 78 S.Ct. 394, 1958 AMC 251.

There should be no question as to the applicability of the *Pennsylvania* rule in this case since it has been held applicable even where there has not been a "collision" in the true maritime sense of the term, such as

an action involving contact between a barge in tow of a tug and an "ice breaker" fender structure installed to protect a bridge abutment.

Merritt-Chapman and Scott v. Cornell SS Co.
(CA 2—1959) 265 F.2d 537, 1959 AMC
1099.

In the present case the trial court found in Finding of Fact 16(b) that appellants' tug and barge did not have in place and burning the navigation lights required by existing law and regulation (Tr. 60), although the evidence showed that the tow of the barge into the slip alongside the "COTTON STATE" took place more than two hours after the official hour of sunset and when it was dark (Finding 11, Tr. 57). See also testimony of tug master and deckhands as to absence of any lights on barges and as to the condition of darkness prevailing at the time (Tr. 485, 529, 554).

Statutory requirements with respect to lights on barges at the location and time in question are contained in Title 33 U.S. Code §157 and regulations promulgated thereunder. 33 C.F.R. §80.16 (a) and (h) require a white light to be shown at each end of each scow at a distance of not less than eight feet from the water level when being towed on any harbor, river or other inland water of the United States between hours of sunset and sunrise. 33 C.F.R. §80.02 and §80.14. Sunset at Everett on the day in question was at 4:29 P.M. or 1629 hours, more than two hours before the occurrence of the incidents in question (Tr. 186).

The trial judge expressly held in his Oral Opinion that appellants had failed to show

“that the absence of such barge lights did not cause the accident and resulting injury and damage to the vessel’s propeller nor that such failure to have such barge lights in use could not have caused or contributed proximately to cause such injury and damages.” (Tr. 584)

This was incorporated into Finding of Fact No. 17 (Tr. 60-61).

In effect, appellants concede the accuracy of the Findings as to no lights on either barge, but argue that the absence of such lights on the barges could not possibly have contributed to cause the accident and damage in this case (Br. 14-15). This argument must fail in view of the testimony of the chief mate of the vessel that he was not informed as to the length of the barges or the length of the tow and that he was unable to determine that the point to which the master of the tug proposed to secure the forward mooring line from the vessel to the barge would not allow sufficient room for the barge No. 15 to lay safely alongside of the “COTTON STATE” until appellants’ tug was able to take it in separate tow for the purpose of delivering it to the desired position along the offshore side adjacent to one of the forward hatches of the vessel (Tr. 132, 142).

III. Presumption of Fault Against Moving Tug and Barge

A. Applicability of Rule

In maritime collision cases the admiralty courts

apply the rule that when a moving vessel strikes a moored or stationary vessel there is a presumption of fault against the moving vessel. Griffin on Collision, Sec. 25, p. 41. Such an accident has even been said to be "conclusive evidence" that the moving vessel was at fault. *The Granite State* (1866) 3 Wall. 310, 18 L.Ed. 179.

This Court has previously applied this presumption against a moving vessel to a case similar to the present case involving movement of barges by a tug in a slip which resulted in damage to a vessel moored at a pier. *Sehlmeyer v. Romeo Co.* (CA 9—1941) 117 F.2d 996, 1941 AMC 563. Cf. *The Marian* (CA 9—1933) 66 F.2d 354, 356, 1933 AMC 1329, involving collision of a tug with an anchored drill barge, and other cases on this same point cited therein.

B. Appellants' Authorities Not Applicable

The cases cited by appellants in their brief (p. 9) recognize the applicability of this presumption to situations as in the present case involving damage to vessels moored at piers when struck by "drifting" or moving vessels. *The Buffalo—The President* (CA 2—1932) 56 F.2d 738, 1932 AMC 444; *Burns Bros. v. Long Island R. Co.* (CA 2—1949) 176 F.2d 406, 1949 AMC 1697.

Other cases cited on this point by appellants are clearly distinguishable. Thus, in *U.S.A. v. Seas Shipping Co.* (EDNY—1950) 92 F.Supp. 902, 1950 AMC 1081 the court expressly found that adequate notice of the turning of the ship's propeller had not been given to either the stevedoring company unloading the barge

or to the bargee on duty on the barge, a finding as to lack of warning quite different than the finding of the trial judge in the present case (Finding No. 7, Tr. 56).

Likewise, in *Rusted v. Nicaragua Mail Steam Nav. Co.* (SDNY—1893) 56 Fed. 1022 the court found that the master of a vessel anchored in an open roadstead ordered lines to a barge moored alongside to be cast loose before a tug was able to secure its hawser to the barge to tow it away.

Contrary to the statement in appellants' brief (p. 9) the court in *The Hektor* (D. Md.) 1935 AMC 336 did not impose liability on a ship for damage to a barge moored alongside which was caused by the slow turning of the propeller while warming up the engines, nor did the court find the vessel at fault for improper control of barge mooring lines. The condensed report of the case states:

“The Court further found that the ship was not negligent in failing to post a lookout at the stern.”

A direct quotation of the opinion of the Court states:

“The ship, I think, was entirely within her rights, therefor, in starting the propeller.”

The Hektor (D. Md.) 1935 AMC 336, 337.

C. Answer to Appellants' Argument

1. *Substitution of Line.* Appellants contend that the attachment of a barge mooring line supplied by the “COTTON STATE” to one of the forward stanchions on the leading scow, and the removal by the deckhand of the tug of the tug's towing hawser from the same stan-

chion, should be treated with great significance (Br. 9-11).

We fail to comprehend the importance of this point, and the trial court apparently did not regard it as significant. It is the usual and standard procedure at Everett and all West Coast U.S. ports for the vessel to furnish mooring lines for barges brought alongside (Tr. 122, 414). The master of appellants' tug acknowledged this to be true (Tr. 482).

2. *Participation by Crew of "COTTON STATE."* Appellants next argue that since one end of the one barge mooring line in use was being handled by members of the crew, it should be regarded as specially significant (Br. 11). We can only state the contrary of this proposition, namely, that *failure* of the ship's crew to assist in securing the barges alongside the vessel might have been the basis for proving some fault against appellee. Since the tug was still in control, and in the process of delivering the barges alongside the vessel (Tr. 500, 502) and since the manner and location for securing the first and only barge mooring line in use was directed entirely by the tug master and the deckhand from the tug on the leading barge (Tr. 141, 203) we fail to see how this point can be of any assistance to appellants.

3. *Claim that Scows Were Safe and at Rest.* These terms as used in appellants' brief (p. 11) not only are wholly unsupported by the evidence but are clearly contrary to the evidence and the factual findings of the trial court.

The tug master admitted in his testimony that the point where he secured barge No. 25 was only "temporarily" and that he *had not* completed delivery of the barges to the "COTTON STATE" (Tr. 499, 502). Also, that he intended to move the barges to other points alongside the vessel (Tr. 500, 502).

Furthermore, the tug master testified unequivocally that he used his own judgment in determining where to land the barges alongside the vessel, that "I judged it would be plenty of clearance" from the stern and propeller and that he did not rely upon any advices or reports from those aboard the "COTTON STATE" (Tr. 492, 493, 494).

In the light of such testimony from appellants' own tug master and subsequent events of the accident, how can it be suggested by appellants' proctors that these scows were "safe" and "at rest"?

4. *Explanation for Collision.* Appellants suggest in this section of their brief (pp. 12-13) that the one mooring line at the forward end of the leading barge must have slipped and that this allowed the barges to drift aft alongside the "COTTON STATE" so that the No. 15 got under the stern counter and in contact with the propeller. There is no evidence whatsoever in the record that this occurred and the quotation of testimony of the chief mate upon which appellants largely rely is based entirely upon an *assumption* that was never established (Tr. 179).

IV. The “*Cotton State*” Was Not Negligent

This refers to Specification of Errors No. 2 of appellants’ brief under which they consider in detail certain of the evidence (Br. 13-24).

Contrary to appellants’ contention, the crew members on the deck of the “COTTON STATE” were not “able to see everything” (Br. 13). Both the chief mate and the boatswain testified that they could not see the stern or after end of the tow (Tr. 132, 205-6). The deckhand who was available on the aft deck of the vessel also stated that “it was dark when we finished. It was so dark we couldn’t see” (Tr. 217).

The importance of the lack of regulation lights on the barges can be appreciated from an examination of the entire testimony of chief mate McLaughlin, boatswain Dusevoir and deckhand Fulmer, particularly at the pages cited above.

Secondly, it should be borne in mind that the barges were *not yet* in the control of the “COTTON STATE.” Only one mooring line had been extended between the leading barge No. 25 and the ship. There was absolutely no line or attachment between the barge No. 15 and the “COTTON STATE” at the time of the accident or in fact, at any time before or after the accident.

Appellants argue that the engine and propeller were engaged in the turning or jacking gear without checking on deck as to whether the propeller and stern area were clear (Br. 18-21). At the outset we can point out that the master of appellants’ tug was aware of the fact that turbine driven vessels such as the “COTTON STATE”

would slowly rotate their propellers in jacking gear after arriving in port, for the purpose of evenly cooling the turbine rotors (Tr. 501).

Although the master of the tug refused to admit that he saw the flashing red warning light and propeller warning signs at the stern of the "COTTON STATE" (Tr. 448) there was an overwhelming amount of positive and affirmative testimony from several other witnesses that these warnings were in place and that the red light was flashing (Tr. 209, 226, 322). This was certainly ample warning of the danger of accident and damage from a barge being allowed to come in under the stern counter of the vessel.

Appellants suggest that the "COTTON STATE" should have had a lookout at the stern and quote testimony of the chief engineer and night engineer in an effort to substantiate the point (Br. 20). However, the chief engineer carefully distinguished between the situation requiring warmup of engines in jacking gear when a vessel prepares to leave a dock and the present situation where the jacking or turning gear is engaged immediately after arrival at a port to cool off the turbine and rotors (Tr. 264, 302-3).

The appellants' contention regarding necessity for a lookout at the stern of the vessel was not proved by any evidence of statutory requirement, custom or usage. In *Robin v. U.S.* (SDNY) 1958 AMC 451 the Court expressly refused to accept a similar contention in the same type of a situation, stating as follows:

"I do not think that the vessel had any duty to

maintain a lookout, notwithstanding the danger that exists with the propeller turning over.”

Robin v. U.S. (SDNY) 1958 AMC 451, 453.

Exactly the same finding as to lack of necessity for a stern lookout was made in *The Cape Friendship* (D. Md.) 1951 AMC 814.

In *Kosnac v. The Norcuba* (CA 2—1957) 243 F.2d 890, 1957 AMC 1219 a vessel which had been at anchor started to move out before a small launch which was alongside had moved away from the vessel. The master and pilot of the vessel had verbally warned all small boats of the intention to move the ship. The trial court held both the launch and the ship at fault. The Court of Appeals for the Second Circuit reversed, dismissing the libel of the launch, and holding that the ship was not at fault. It stated:

“The judge below held that if someone had actually looked over the side, the ‘Octyn’s plight could have been seen,’ and the collision averted.

“In the circumstances here, the *Norcuba* had no duty to do more than give the warning which it did sufficiently in advance of getting under way.* * *

“The warning having been given when the Octyn’s captain thereafter heard the anchor being lifted, and heard and saw the movement of the propellers of the *Norcuba* for ten minutes prior to the accident, he had full knowledge of the dangers attendant in attempting to maintain his position.”

Kosnac v. The Norcuba (CA 2—1957) 243 F. 2d 890, 891, 1957 AMC 1219.

Answering appellants' Specification of Errors No. 3 we submit that there is ample evidence in the record to support the Findings of Fact as to the negligence of the tug in allowing barge No. 15 to drift under the stern counter and against the propeller of the vessel.

The tug had not completed its job of delivering these barges alongside the "COTTON STATE." Whatever may have been the cause of the drifting of the barge, there is no proof that those on the "COTTON STATE" were responsible for this action.

CONCLUSION

Therefore, the presumption against appellants as the moving vessels, and the rule of *The Pennsylvania* as to burden of proving that statutory violations due to lack of any lights on either barge did not and *could not* have contributed to cause the accident remain in the case.

We respectfully submit that the Findings of Fact of the trial court are not "clearly erroneous" and that the Conclusions of Law correctly apply the legal principles which should control in this case. The Final Decree in favor of States Marine should be affirmed in all respects.

Respectfully submitted,

SUMMERS, BUCEY & HOWARD

CHARLES B. HOWARD

T. F. PAUL

Proctors for Appellee.

United States Court of Appeals
For the Ninth Circuit

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BOGLE, BOGLE & GATES

CLAUDE E. WAKEFIELD

EDWARD C. BIELE

Proctors for Appellants.

603 Central Building,
Seattle 4, Washington.

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EDWARD C. BIELE

Proctors for Appellants.

603 Central Building,
Seattle 4, Washington.

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United States Court of Appeals

For the Ninth Circuit

THE PACIFIC TOW BOAT COMPANY, a corporation; and E. W. STUCHELL, WILLIAM D. CARPENTER, HARRY W. STUCHELL, JR., M. A. WYMAN, D. E. WYMAN and M. H. WYMAN, Co-Partners
Doing Business as Eclipse Lumber Co.,
Appellants,

No. 16374

vs.

STATES MARINE CORPORATION OF DELAWARE,
a corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANTS' REPLY TO BRIEF OF APPELLEE

PRELIMINARY

Our brief fully sets forth sufficient reasons why the District Court should be reversed. We note appellee makes no response to important issues raised therein—particularly the undisputed chronology that damage occurred only after the steamer's mooring line was substituted for the tug's hawser and the COTTON STATE's complete failure to minimize damage as the rotating propeller chewed up the scow for perhaps more than four minutes.

APPEAL OF ECLIPSE WITH RESPECT TO ITS LIABILITY TO STATES MARINE

Appellee's suggestion (Br. 4-5) that Eclipse cannot appeal its liability to States Marine is unfounded.

Both appellants appeal the award of *any* damages to States Marine. This raises the basic issue of the faults or lack of them on the part of the three vessels involved herein. Any liability on the part of Eclipse to States Marine must be based upon supposed faults of its dumb scow such as uncontrolled drifting into the COTTON STATE or a lack of lights — matters raised squarely by the appeal. Eclipse's recovery over from Pacific of any liability to appellee is merely secondary to the primary resistance to States Marine on the part of both appellants.

Contrary to appellee's argument, Eclipse is not fully protected. If Pacific is exonerated from primary liability to States Marine there can be no secondary liability of it to Eclipse regardless of any appeal. The MARY ETHEL, 2 Cir., 294 Fed. 525, 527, reversed on other grounds *sub nomine*, *Davis v. Donovan* (1924) 265 U.S. 257, 68 L.ed. 1008. Compare *Schiavone-Bonomo Corporation v. Buffalo Barge Towing Corporation*, 2 Cir., 134 F.(2d) 1022, cert. denied (1944) 320 U.S. 749, 88 L.ed. 445. The vice of appellee's argument is it would allow States Marine damages on a theory of recovery over by Eclipse from a not liable Pacific.

Further, Eclipse is not fully protected with respect to any allowance of full recovery against Pacific because the extent of Pacific's potential liability to

Eclipse is the sum of the decree's liability to States Marine plus the amount of Eclipse's own damages, a total of \$32,523.50, plus interest now running. This is in excess of any security posted by Pacific and possibly available to Eclipse (Release and cost bond on tug LEA MOE, Tr. 11). Thus a review of the entire decree is necessary to protect Eclipse.

Even assuming for argument's sake that appellants did not technically appeal from that part of the decree which gives Eclipse recovery over from Pacific with respect to the former's liability to States Marine, appellee gets no comfort because these appellants contesting damages to appellee open up the jurisdiction of this Court concerning the whole decree giving any recovery to States Marine. The *SAN RAFAEL*, 9 Cir., 141 Fed. 270, 275; The *MARY ETHEL*, *supra*. After decision on the faults of the three vessels the mandate can direct an appropriate decree on any issue of secondary liability growing out of primary liability.

Finally, it has been clear throughout this litigation that as to States Marine what occurs between Eclipse and Pacific with respect to recovery over as between the tug and tow is *inter alios*. This is shown, for example, by the common appeal, the common supersedeas running to appellee, the common proctors, and the common brief. But each appellant resists any liability to the States Marine. If appellants do not contest recovery over between themselves, there is no prejudice to appellee which has adequate security from both Eclipse and Pacific as their respective release bonds show (Tr. 11, 13).

NO CASE FOR RULE OF PRESUMPTION OF FAULT AGAINST MOVING VESSEL

A review of all cases cited in Griffin on Collision, Sec. 25, p. 41, referred to by appellee (Br. 12) as calling for applicability of admiralty's presumption of fault against a moving vessel striking a moored or stationary one, failed to disclose a single holding comparable to the present case where the COTTON STATE was the consignee of the scows, her officers and crew participated in tying them up, and the capacity to control the scows was in those officers and crew members. In each of the referred to cases the moving vessel held at fault was a complete and total stranger to the stationary one. This is true in the specific cases cited by appellee:

The GRANITE STATE (1866) 3 Wall. 310, 18 L.ed. 179. A vessel lying at a pier struck by a steamer attempting to berth at a nearby dock.

Sehlmeyer v. Romeo Co., 9 Cir., 117 F.(2d) 996. A scow in tow of a tug struck a moored fishing vessel to which it was a stranger.

The MARIAN, 9 Cir., 66 F.(2d) 354. A drilling barge struck by a passing tow.

Failure to appreciate the distinction we point out was one of the District Court's fatal errors.

LIGHTS ON NO. 15 WERE NOT NEEDED FOR OBSERVATION FROM THE COTTON STATE

Our brief (P. 13-18) discusses the testimony of the witnesses from the COTTON STATE, including the chief mate, who saw, or should have seen, what was going on

with regard to the scows landing alongside. Appellee's answer (Br. 10-11) refers to technical sunset and gives limp excuses for the COTTON STATE's chief officer.

That gentleman's stated reason why he did not see the end of the scow No. 15 was not because of any lack of light on her, but because "the lumber was too high" (Tr. 132). The height referred to was the built up lumber cargo which extended perhaps fourteen feet up from the flat deck of the scow and occupied all but a few feet of her deck space. The chief officer observed the deck cargo sufficiently for him to describe it in detail. Moreover, it is important to bear in mind that the point of contact was some forty feet forward from the end of the No. 15, or thirty feet forward from the end of her lumber cargo which the mate was able to observe drift against the side of the steamer.

FAULT IN ABSENCE OF ANY CHECK ASTERN ON COTTON STATE WHEN PROPELLER STARTED

At 1840 the scows were landed alongside the COTTON STATE and simultaneously her propeller was started without any check or assurance to the engine room that the stern area was clear of obstruction or the likelihood of it. Appellee's witnesses testified to a practice for a deck officer to make an inspection astern before the propeller is started rotating. It failed to produce any one who made such a check. Its brief (Br. 16-18) seeks to exercise this fault with the plea that no statutory requirement, custom or usage calls for a lookout long after the jacking gear is engaged.

Those cases in our brief (P. 20) requiring a check

astern before starting up the propeller technically apply the general prudence requirement of Article 29 of the Inland Rules, 33 U.S. Code §221. Appellee's authorities are readily distinguished:

Robin v. U.S.A., S.D.N.Y. 1958 A.M.C. 451. Held no duty to *maintain* a lookout long after propeller started turning over.

CAPE FRIENDSHIP, D. Md. 1951 A.M.C. 814. After propeller started up no need for *continuing* watch when it was struck by a barge engaged in loading another vessel lying behind damaged vessel.

Kosnak v. THE NORCUBA, 2 Cir., 243 F.(2d) 890. Stranger launch specifically told to clear anchored vessel about to get under way. Launch attempted to maintain position on steamer for ten minutes after seeing propellers rotating and hearing anchor being lifted.

HEKTOR, D. Md., 1935 A.M.C. 336. Appellee's discussion (Br. 13) mistates our reference to this case. Its significance herein is: (1) A vessel is within her right to start her propeller only after making an investigation to see if stern area clear, and thereafter, no need to keep a lookout. (2) The ship was not responsible for collision because longshoremen aboard her, instead of her officers, mishandled mooring lines led to the barge. The Court stated: "I believe that a steamer lying at a wharf ought not to start her screw or propeller without carefully looking to see whether it is going to disturb any property or situation in proximity to it." This language exactly fits own case.

Appellee reasons that exhibition of warning signs is an adequate substitution for a check up on conditions of clearance astern when the jacking gear is about to be engaged. We note the chief officer's concession of a practice on the COTTON STATE to look astern "even though the signs are up" at least when getting underway (Tr. 264). Further on, however, he was more explicit with this testimony, "When they start the engine they (deck personnel) have to notify us that everything is clear — *they always do* and it is * * * " (Tr. 302). (Emphasis added) Other witnesses confirm this practice which was lacking in the present matter.

CONCLUSION

We refer to our brief and respectfully ask the Court to determine: (1) a lack of any faults upon appellants and their vessels, (2) sole fault upon the COTTON STATE, (3) the denial of the award of any damages, directly or indirectly, to appellee, and (4) the decree of all Eclipse's damages from appellee.

Respectfully submitted,

BOGLE, BOGLE & GATES

CLAUDE E. WAKEFIELD

EDWARD C. BIELE

No. 16377 ✓

United States
Court of Appeals
for the Ninth Circuit

WILLIAM D. FREEMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

FILED

APR - 6 1959

PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court for the
Southern District of California
Southern Division.



No. 16377

United States
Court of Appeals
for the Ninth Circuit

WILLIAM D. FREEMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Southern Division.

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

EDGAR G. LANGFORD,
J. PERRY LANGFORD,
416 Spreckels Building,
San Diego 1, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;
PETER J. HUGHES,
Assistant U. S. Attorney;
U. S. Customs & Courthouse Building,
San Diego 1, California.

United States District Court for the Southern
District of California, Southern Division

No. 27,757—Criminal

UNITED STATES OF AMERICA,

vs.

WILLIAM D. FREEMAN.

JUDGMENT

On this 26th day of Sept., 1958, came the attorney for the government and the defendant appeared in person and by counsel, E. G. Langford.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a finding of guilty of the offense of failure to register as convicted marihuana violator, in violation of U.S.C., Title 18, Sec. 1407, as charged in the Indictment in one count, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the imposition of sentence is suspended and defendant is placed on probation for a period of four years, on condition that he obey all laws, Federal, State or municipal, that he comply with all lawful rules of the Probation Officer, that he does not use nor associate with known users of

marihuana or narcotics in any form, and that he does not enter Mexico without permission from the Probation Officer.

It Is Adjudged that bond of defendant is exonerated.

/s/ JACOB WEINBERGER,
United States District Judge.

[Endorsed]: Filed September 26, 1958. [2]

[Title of District Court and Cause.]

NOTICE OF APPEAL

William D. Freeman, defendant above named, whose address is 2936 Webster Avenue, San Diego, California, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of conviction entered against him in the above-entitled cause on the 26th day of September, 1958.

Imposition of sentence in said cause was suspended and the defendant was placed on probation. He is presently at liberty.

Dated, this 3rd day of October, 1958.

EDGAR G. LANGFORD, and
J. PERRY LANGFORD,

By /s/ EDGAR G. LANGFORD,
Attorneys for Defendant.

[Endorsed]: Filed October 3, 1958. [3*]

[Title of District Court and Cause.]

APPLICATION TO EXTEND TIME FOR FILING
RECORD AND DOCKETING APPEAL,
AND ORDER

Defendant and appellant, William D. Freeman, hereby applies to the above-entitled Court for an order extending his time for filing the record and docketing the appeal in the above-entitled action until the 10th day of December, 1958. This application is made on the following grounds and reasons:

1. Notice of Appeal was filed on the 3rd day of October, 1958.

2. Defendant and appellant is informed that the Clerk is unable to complete the record on appeal within forty (40) days of the filing of the Notice of Appeal. [4]

3. Counsel for plaintiff and defendant are now in the process of agreeing upon a statement of the evidence to be used in lieu of a transcript.

Wherefore, defendant and appellant, William D. Freeman, respectfully requests that he be granted an extension of time to and including the 10th day of December, 1958, within which to file the record and docket the appeal herein.

Dated: November 12, 1958.

Respectfully submitted,

EDGAR G. LANGORD, and
J. PERRY LANGFORD,

By /s/ EDGAR G. LANGFORD,
Attorneys for Defendant
and Appellant.

Points and Authorities

Federal Rules of Criminal Procedure,
Rule 39-C.

I hereby acknowledge receipt of the within Application to Extend Time for Filing Record and Docketing Appeal on behalf of defendant and appellant, William D. Freeman, on this 12th day of November, 1958.

LAUGHLIN E. WATERS,
United States Attorney for the Southern District of
California.

By /s/ PETER J. HUGHES,
Assistant United States
Attorney.

ORDER

It Is So Ordered This 12th day of November,
1958.

/s/ JACOB WEINBERG,
U. S. District Judge.

[Endorsed] : Filed November 12, 1958. [5]

[Title of District Court and Cause.]

STIPULATION AS TO FACTS

It Is Hereby Stipulated and Agreed by and between plaintiff and defendant herein, through their respective counsel, that the ultimate facts, established by the evidence introduced at the trial of the above-entitled cause, and the stipulations entered into thereat, which are necessary for a proper determination of the points presented by the appeal of said defendant from the judgment of the Court finding him guilty of having violated the provisions of the United States Code, Article 18, Section 1407, are as follows, to wit:

Defendant was prosecuted under an indictment charging that the defendant, being a citizen of the United States who had been convicted of a marijuana offense for which a sentence of more than one (1) year might have been imposed, did fail to register with the customs officials upon his return to the United States on July 20, 1958, and did fail to surrender the certificate required to be [7] obtained upon leaving the United States.

The defendant entered a plea of not guilty, waived trial by jury, and on August 22, 1958, was tried before the Honorable Jacob Weinberger, Judge, sitting without a jury.

At the trial, the parties stipulated that on July 20, 1958, defendant was a citizen of the United States; that, on said day, he returned to and entered the United States at the port of San Ysidro,

in San Diego County, within the Southern District of California; that, at the time of such entry, he did not register with a customs agent or employee; that he did not surrender a certificate required to be obtained upon leaving the United States by persons who had been convicted of a violation of the marijuana or narcotics laws of the United States or a State, the penalty for which is imprisonment for more than one (1) year.

It was further stipulated that on June 20, 1955, in the Superior Court of the State of California, in and for the County of San Diego, defendant was found guilty of having violated the provisions of California Health and Safety Code Section 11500, by possessing marijuana; that on July 14, 1955, said Court made an order suspending imposition of sentence and placing defendant on probation for a period of three (3) years; that defendant's probation period expired on July 14, 1958, and on [8] July 31, 1958, the Honorable John A. Hewicker, Judge of said Court, acting under authority of California Penal Code Section 1203.4, made an order directing that the verdict finding defendant guilty be vacated, a plea of not guilty entered, and the information upon which he had been prosecuted be dismissed; and further that the defendant be released and discharged and further relieved from all the penalties and disabilities resulting from the offense of which said defendant was convicted.

In addition to said oral stipulations made at the trial, there were admitted in evidence, the following documents:

1. Government's Exhibit "I," a certified copy of the order made by the Superior Court of the State of California, in and for the County of San Diego, granting defendant probation.

2. Government's Exhibit "II," a certified copy of the Information charging the defendant and the Minutes of said aforementioned Court at the time defendant was found guilty.

3. Defendant's Exhibit "A," a certified copy of the Affidavit of the Probation Officer, and the Order of the Court, dismissing the Information.

Upon the foregoing evidence, the trial court found defendant guilty as charged, and ordered that sentence be suspended and defendant placed on probation for a [9] period of four (4) years.

Defendant's appeal is based solely upon the ground that the evidence presented at the trial is and was insufficient to sustain the finding of the trial court, for the reason that it failed to establish that on July 20, 1958, defendant was a person who was required to register under the provisions of the United States Code Section, Title 18, Section 1407.

Dated: November 28, 1958.

PETER J. HUGHES,
Assistant United States
Attorney;

By /s/ PETER J. HUGHES,
Attorney for Plaintiff.

EDGAR G. LANGFORD, and
J. PERRY LANGFORD,

By /s/ EDGAR G. LANGFORD,
Attorneys for Defendant.

The foregoing Stipulation as to Facts is hereby approved.

Dated: December 4, 1958.

/s/ JACOB WEINBERGER,
Judge.

[Endorsed]: Filed December 5, 1958. [10]

[Title of District Court and Cause.]

APPLICATION TO EXTEND TIME FOR
FILING RECORD AND DOCKETING AP-
PEAL

Defendant and appellant, William D. Freeman, hereby applies to the above-entitled Court for an order extending his time for filing the record and docketing the appeal in the above-entitled action until the 27th day of December, 1958. This application is made on the following grounds and reasons:

1. Notice of Appeal was filed on the 3rd day of October, 1958.

2. Defendant and appellant is informed that the Clerk is unable to complete the record on appeal within the time heretofore fixed for filing the record and docketing said appeal. [11]

3. That an agreed statement of the evidence to be used in lieu of a transcript has been filed with the Clerk of this Court.

Wherefore, defendant and appellant, William D. Freeman, respectfully requests that he be granted an extension of time to and including the 27th day of December, 1958, within which to file the record and docket the appeal herein.

Dated: December 9, 1958.

Respectfully submitted,

EDGAR G. LANGFORD, and
J. PERRY LANGFORD,

By /s/ EDGAR G. LANGFORD,
Attorneys for Defendant and
Appellant.

Points and Authorities

Federal Rules of Criminal Procedure,
Rule 39-C.

I hereby acknowledge receipt of the within Application to Extend Time for Filing Record and Docketing Appeal on behalf of defendant and appellant, William D. Freeman, on this 9th day of December, 1958.

LAUGHLIN E. WATERS,
United States Attorney for the Southern District
of California;

By /s/ PETER J. HUGHES,
Assistant United States
Attorney.

ORDER

It Is So Ordered this 9th day of December, 1958.

/s/ JACOB WEINBERGER,
U. S. District Judge.

[Endorsed]: Filed December 9, 1958. [12]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages, numbered 1 to 12, inclusive, containing the original:

Judgment.

Notice of Appeal.

Application to extend time for filing Record and Docketing Appeal and Order thereon, filed 11/12/58.

Stipulation as to Facts.

Application to extend time for filing Record and Docketing Appeal and Order thereon, filed 12/9/58.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: February 9, 1959.

[Seal] JOHN A. CHILDRESS,
 Clerk;

By /s/ WM. A. WHITE,
 Deputy Clerk.

[Endorsed]: No. 16377. United States Court of Appeals for the Ninth Circuit. William D. Freeman, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed: February 10, 1959.

Docketed: February 24, 1959.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 16378 /

**United States
Court of Appeals
For the Ninth Circuit**

BURL MELTON HOWZE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Northern Division.**

FILED

APR - 6 1959

PAUL P. O'BRIEN, CLERK

No. 16378

United States
Court of Appeals
For the Ninth Circuit

BURL MELTON HOWZE,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Northern Division.

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. B. TIETZ,
257 So. Spring Street,
Los Angeles 12, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division;

ROBERT D. HORNBAKER,
Assistant U. S. Attorney;
600 Federal Building,
Los Angeles 12, California.

United States District Court for the Southern
District of California, Northern Division

No. 3582-ND

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BURL MELTON HOWZE,

Defendant.

September, 1958, Grand Jury

INDICTMENT

[U.S.C., Title 50, App., Sec. 462—Failure to report
to local board for civilian work.]

The grand jury charges:

Defendant Burl Melton Howze, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 77, said Board being then and there duly created and acting, under the Selective Service System established by said Act, in Kern County, California, in the Northern Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was clasified in Class I-O and was notified of said classification; thereafter, the defendant was ordered by Local

Board No. 77 to report on June 17, 1958, to said Local Board at 628 Bernard Street, Bakersfield, California, in Kern County, California, within the division and district aforesaid, to be given instructions to proceed to a place of employment for civilian work contributing to the maintenance of the national health, safety and interest; and defendant was further ordered by said Local Board No. 77 to report for such employment pursuant to said instructions and to remain in such employment for twenty-four (24) consecutive months or until such time as released or transferred by proper authority; that defendant reported to Local Board No. 77 on June 17, 1958, and was instructed to proceed and report to the Los Angeles County Department of Charities, 1200 North State Street, Los Angeles, California, in Los Angeles County, California, within the Central Division of the Southern District of California, on June 18, 1958, for work as an institutional worker in lieu of induction; that defendant reported to the Los Angeles County Department of Charities at the time and place so ordered, and at said time and place, the defendant knowingly failed and neglected to perform a duty required of him under the Universal Military Training and Service Act and the regulations promulgated thereunder in that he failed and neglected to remain in employment for twenty-four (24) consecutive months or until such time as released or transferred by proper authority.

A True Bill.

/s/ L. A. ADAMS,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

[Endorsed]: Filed September 17, 1958.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT
OF ACQUITTAL

The defendant moves the Court for a judgment of acquittal for each and every one of the following reasons:

1. The order of the local board for defendant to perform civilian work at Los Angeles County Department of Charities, and Sections 1660.1 and 1660.20 of the Selective Service regulations are in conflict with the Act in that they have enlarged on the Act and are contrary to the intent of Congress.

2. The Act, as construed and applied by the regulations and the order, is in violation of the Thirteenth Amendment of the United States Constitution because it calls for a private, non-federal labor draft for the performance of services that are neither exceptional nor related to national defense in time of war or during a declared emergency.

3. The Act, as construed and applied by the regulations and order, is contrary to the Fifth

Amendment to the Constitution because it deprives the defendant of due process of law.

4. The draft board violated defendant's rights under the Act and the Regulations to have his claim for an agricultural classification considered because it completely by-passed and skipped consideration of his evidence; it did not consider him for the "lowest" classification possible, which was II-C, but only for the sole classification in which it ever classified him, namely, I-O, erroneously following his suggestion (on SSS Form No. 100) that I-O was the classification he should have.

5. There is no evidence to show that the defendant is guilty as charged in the indictment.

6. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment in that there is no showing that he was given a physical examination within one year of the order to report for civilian work.

7. That said motion is also based on such other grounds, not hereinabove included, as are set forth in defendant's Memo of Points and Authorities.

Respectfully submitted,

/s/ J. B. TIETZ,

Attorney for Defendant.

Dated: November 12, 1958.

[Endorsed]: Filed November 12, 1958.

United States District Court for the Southern
District of California, Northern Division

No. 3582-ND

UNITED STATES OF AMERICA,

vs.

BURL MELTON HOWZE.

JUDGMENT AND COMMITMENT

(USC 50, App. Sec. 462—Failure to report to
local board for civilian work.)

On this 12th day of November, 1958, came the attorney for the government and the defendant appeared in person and with his attorney J. B. Tietz.

It is Adjudged that the defendant has been convicted upon trial and judgment by the Court of the offense of: knowingly failed and neglected to perform a duty required of him under the Universal Military Training and Service Act in that he failed and neglected to remain in employment for twenty-four (24) consecutive months or until such time as released or transferred by proper authority, as charged in the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year and One (1) Day in a place of imprisonment selected by the Attorney General.

It Is Ordered the defendant is granted a stay of execution until 5:00 o'clock p.m., November 25, 1958, and that defendant may remain on bond on file.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed November 12, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Burl Melton Howze, resides at Route 1, Box 108, Shafter, California.

Appellant's attorney, J. B. Tietz, maintains his office at 410 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction,

U.S.C., Title 50 App., Sec. 462—Universal Military Training and Service Act, 1951.

On November 12, 1958, after a verdict of Guilty, the Court sentenced the appellant to one year and one day confinement in an institution to be selected by the Attorney General.

I, J. B. Tietz, appellant's attorney, being authorized by him to perfect an appeal, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 19, 1958.

[Title of District Court and Cause.]

EXTENSION OF TIME

For good cause shown, defendant is hereby given 50 additional days, to and including February 17, 1959, to prepare and docket the record on appeal.

Dated: December 18, 1958.

/s/ BURT HARRISON,
Judge.

[Endorsed]: Filed December 18, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages, numbered 1 to 11, inclusive, containing the original:

Indictment, filed 9/17/58.

Motion for Judgment of Acquittal.

Judgment.

Notice of Appeal.

Extension of time to docket record on appeal and order thereon.

Designation of Record on Appeal.

B. Plaintiff's Exhibit No. 1.

Dated: February 17, 1959.

[Seal] /s/ JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16378. United States Court of Appeals for the Ninth Circuit. Burl Melton Howze, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed: February 18, 1959.

Docketed: February 24, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16378

BURL MELTON HOWZE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

There was no evidence to show that the defendant is guilty as charged in the indictment.

II.

The draft board violated defendant's rights under the Act and the Regulations to have his claim for an agricultural classification considered because it completely by-passed and skipped consideration of his evidence.

III.

The Act, as construed and applied by the regulations and the order to report for civilian work is

in violation of the Thirteenth Amendment of the United States Constitution because it calls for a private, nonfederal labor draft for the performance of services that are neither exceptional nor related to national defense in time of war or during a declared emergency.

/s/ J. B. TIETZ,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 24, 1959.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 16378.

BURL MELTON HOWZE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

J. B. TIETZ,
Law Offices,
410 Douglas Building,
South Spring and Third Streets,
Los Angeles 12, California,
Telephone MADison 5-1693,
Attorney for Appellant.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 16378.

BURL MELTON HOWZE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Northern Division. The appellant was sentenced to custody of the Attorney General for a period of one year and one day (R. 7-8).^{*} Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law (R. 8-9).

^{*}R. refers to the printed Transcript of Record.

STATEMENT OF THE CASE.

The indictment charged appellant with a violation of the Universal Military Training and Service Act (R. 3-4). He became a registrant of Local Board No. 77 of the Selective Service System in the City of Bakersfield, California, in Kern County, California, and, it was charged that having theretofore been duly classified in Class I-O, did knowingly refuse and fail to comply with the order of his said Local Board No. 77 in that he failed and neglected to remain in specified civilian work contributing to the maintenance of the national health, safety and interest as provided in the said Act and the rules and regulations made pursuant thereto (R. 4).

Appellant pleaded not guilty, waived jury trial and was tried on November 12, 1958 (R. 7). A written motion for judgment of acquittal was filed (R. 5-6). The motion was denied and the appellant was found guilty and sentenced on November 12, 1958 (R. 7-8). A written Statement of Points on which Appellant Intends to Rely on Appeal was filed (R. 12-13). Said Statement contains all of the grounds that the appellant relies upon for reversal of the judgment in this case.

THE FACTS.

Appellant registered with Local Board No. 77 on August 14, 1953 (Ex. 2).^{*} He filed his 8-page Classification

^{*}Ex. refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

Questionnaire on October 12, 1953 (Ex. 5). In it he showed he was a farmer (Ex. 8), that he had pursued this work since early youth (Ex. 9) and that the products raised were alfalfa, cattle and hogs for an annual sale value of about \$15,000.00 (Ex. 9). He also showed he was a conscientious objector to military activity (Ex. 11). Additionally, on October 12, 1953, his father filed an affidavit showing that appellant was regularly occupied as a farm worker and was essential to the operation of the farm, giving facts (Ex. 13).

He was mailed the Special Form for Conscientious Objectors by the Local Board (Ex. 14) and thereafter it promptly classified him in Class I-O, as a conscientious objector (Ex. 12). It ignored his claim and evidence for a lower classification, namely, II-C, agricultural worker.

Thereafter, on June 6, 1958, he was ordered to report to the local board on June 17, 1958, for forwarding to the Los Angeles Department of Charities for two years of civilian work. He reported to the board's office, as ordered and followed the instructions to proceed to the Los Angeles Department of Charities. There he refused the work assignment offered (Ex. 66).

QUESTIONS PRESENTED AND HOW RAISED.

I.

Was the draft board required to consider the claim and evidence presented by appellant for an agricultural classification? This question, and all others, was raised by the motion.

II.

Was the prosecution's burden met, or, as claimed by appellant, was there a failure of evidence in that the indictment was based on the charge appellant had failed to remain on the job and the evidence showed he had never started work?

III.

Does the Act as construed and applied by the Selective Service System violate the Thirteenth Amendment?

SPECIFICATION OF ERRORS.

I.

The district court erred in failing to grant the motion for judgment of acquittal.

II.

The district court erred in convicting the defendant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT.

I.

The defendant's *prima facie* showing for an agricultural classification was ignored, to his prejudice.

II.

A variance exists between the charge and the proof.

III.

Absent a real emergency requiring a federal labor draft, a peace-time labor draft, for unexceptional work, is contrary to the Constitution.

ARGUMENT.

I.

The Draft Board Violated Defendant's Rights under the Act and the Regulations to Have His Claim for an Agricultural Classification Considered Because It Completely By-Passed and Skipped Consideration of His Evidence.

The evidence shows appellant presented a *prima facie* case for a II-C classification, agricultural occupation. No contrary evidence, if any existed, was ever placed in the file. Therefore, he should have been classified in Class II-C. It was incumbent on the board to place adverse evidence in the file, as a justification for rejecting his claim. Worse yet, there is nothing to indicate that his claim was even considered. *Dickinson v. United States*, 74 S. Ct. 152.

The regulations of the Selective Service System, 32 C.F.R., Sec. 1623.2, require that a registrant be classified in the "lowest" class, according to a table which places II-C "lower" than I-O.

II.

There Was No Evidence to Show That the Defendant Is Guilty As Charged in the Indictment.

The appellant was indicted for one type of draft law violation, namely, that he "failed and neglected to remain in employment" (R. 4) and the evidence was bare of proof of this, the trial court accepting as proof of the charged

offense evidence (undisputed) that appellant had not started the employment (Ex. 66). The said evidence is clear that he had refused the work assignment. Appellant believes that more than a question of semantics is involved. The questions that arise here are how far indictment and conviction thereon must protect a defendant from the hazard of a future indictment in the same jurisdiction, for the sole act involved.

Initially, appellant submits that an indictment couched: "failure to perform a duty required by the act" would be too vague, for the Act imposes many dozen duties. This should need no argument.

Next, the history of Selective Service prosecutions shows a long-recognized distinction between the various offenses: for example, between failure to report for induction and failure to submit to induction.* With respect to civilian work, there is a long established distinction between failure to accept civilian work, as ordered, and failure to remain at the civilian work. In this connection, compare *Dingman v. United States*, 9 Cir., 156 F.2d 149, where the indictment properly charged Dingman "absented himself without authority" (149); *Roodenko v. United States*, 10 Cir., 147 F.2d 752, where "He was convicted of refusing to work and perform the duties assigned to him by the Director of C. P. S. Camp No. 111" (753); *Gormly v. United States*, 7 Cir., 136 F.2d 227, where, as in the case at bar the registrant didn't start work, he was

*The distinctions in the indictments involving such offenses are noted by this Court in its decisions; for example, in *Francy v. U. S.*, 217 F.2d 750, 751, and *Franks v. U. S.*, 216 F.2d 266, 267.

indicted for the exact offense (he didn't report for transportation to the work) the indictment reading failed "to report on the 24th day of August, 1942, etc." (229); *Kramer v. United States*, 6 Cir., 147 F.2d 756, where, as in the case at bar, the indictment was couched in very similar language:

"Yet, these six males bolted the civilian camp; or, as put in the indictment, in June and July, 1943, each left the camp to which he had been assigned 'without being released or transferred by proper authority, and not in performance of assigned duties or authorized missions and without leave outside of said camp; contrary to the provisions of the Selective Training, etc., and the Rules-Regulations, etc.'" (757).

Also see *Gibson v. United States*, 67 S. Ct. 301 (companion case: *Dodez v. United States*), where each was indicted in accurate language, to describe his precise offense: Gibson for leaving the C. P. S. Camp, after 5 days there, and Dodez for refusing to go to the C. P. S. Camp.

The problem of variance was considered in *United States v. Tuffanelli*, 7 Cir., 131 F.2d 890, where a conviction was reversed, and *Heitman v. United States*, 9 Cir., 5 F.2d 887, was cited. Heitman held that where "the allegation of the place is a necessary part of the description of the offense" it "must be proved as laid." (888).

Appellant urges that the indictment should have been limited to the act shown by the proof, namely, that the work was never begun, and that the proof in such offenses should conform to the charge.

III.

The Act, As Construed and Applied by the Regulations and the Order to Report for Civilian Work Is in Violation of the Thirteenth Amendment of the United States Constitution Because It Calls for a Private, Non-Federal Labor Draft for the Performance of Services That Are Neither Exceptional nor Related to National Defense in Time of War or During a Declared Emergency.

The court's first thought on this point could well be that its Niles and Reese decisions,* among others foreclose this defense.

A.

This Defense Is Available.

The most recent consideration of any portion of the above-stated point, by this Court, was in the Reese case, in 1955. The argument presented on it and on the several other constitutional points was swept aside with the following comment, on page 773:

“There is a short answer to this sweeping indictment. This Court has previously passed upon a similar and closely related contention and rejected it as being without merit. *Niles v. United States*, 9 Cir., 220 F.2d 278, affirming a judgment of the lower court in *United States v. Niles*, 9 Cir., 122 F. Supp. 382. A petition for certiorari to this Court in the Niles case was denied on May 23, 1955, 349 U.S. 939, 75 S. Ct. 784.

**Niles v. United States*, 9 Cir., 220 F.2d 278; *Reese v. United States*, 9 Cir., 225 F.2d 766.

“Appellant does not indicate in his briefs any reason for departure from the general doctrine announced in our Niles decision nor does he even refer to that opinion.”

Two things are evident:

1. Reese is bottomed on Niles;**
2. Reasons “for departure from the general doctrine in our Niles decision” are presentable, if existing.

Let us first examine Niles. It shows that this Court’s one paragraph *per curiam* opinion is based on the rationale of the district court’s opinion, 122 F. Supp. 382. “The judgment of conviction is affirmed for the reasons given by the trial court, 122 F. Supp. 382”. The district court’s opinion, with respect to our Thirteenth Amendment point, reveals that it is based on *United States v. William Patrick Wylie*, No. 11060, N. Dist. (N. Div.) Calif., 1954, and *Heflin v. Sanford*, 5 Cir., 1944, 142 F.2d 798.

With respect to Wylie, it is to be noted that none of the rationale of this unreported decision is quoted by the district court, in Niles. Appellant believes an unreported district court case may be considered good authority, but it hardly need be added, only to the degree that is reasoned out and that its rationale is convincing. Appellant rep-

**Research indicates that other courts have similarly bot-tomed their decisions on Niles: *United States v. Hoepker* 7 Cir., 1955, 223 F.2d 921 (using Niles at 923), affirming three district court rejections of “similar and closely related contentions”; each of the three district decisions in turn is bottomed on Niles: Smith, 124 F. Supp. 406, cites Niles at 410; Thomas, 124 F. Supp. 411, cites Smith at 415; Hoepker, 126 F. Supp. 118 also cites Smith, at 122.

resents that Wylie didn't raise the precise Thirteenth Amendment point raised here and, further, that the following is the reasoning given by the district court in disposing of Wylie's point:

"As to the question as to whether or not the requirement that work of national importance be done with an agency other than an agency of the United States Government is under the 13th Amendment a punishment which violates that provision of the Constitution, I am at this time going to rule that that does not violate the 13th Amendment, and in that situation I am going to leave the matter for a court of appeal if the matter is carried to a court of appeal."

With respect to Heflin, it is readily to be observed that this was a case involving a registrant who *was doing* federal work *and during wartime*. He was in a Civilian Public Service Camp, a federally instituted and supervised system of civilian work for WW II registrants classified as conscientious objectors to all participation in military activity. It is therefore no authority for rejecting the present point, towit: that there is no emergency requiring a labor draft.

It is also to be noted that Judge Roche in his Niles district court opinion declared: "The constitutionality of the Selective Service Law has been attacked on many occasions. In every case the constitutionality of the law has been upheld. *United States v. Henderson*, 7 Cir., 180 F.2d 711; *Richter v. United States*, 9 Cir., 181 F.2d 591." (384).

A reading of those two cases shows they do not touch on the present point at all: Henderson decided only that

Congress could raise and support an *army* in peacetime. It is evident also that Henderson was argued on a First Amendment, religious liberty basis.

Richter emphasizes both the military and the emergency factors involved: "The government has the right to the military service of all of its able-bodied citizens, and may, when an emergency arises, justly exact that service from all." (592-593). After citing a case, this Court went on, in Richter: "The power to raise and support armies is not limited to time of war. Congress has the power to compel military service of a citizen in peacetime or wartime, whenever it declares that it is necessary or that an emergency exists requiring the raising of an army." (593).

It is submitted that the defense herein argued that a piece-time draft for *civilian* work requires an emergency situation is an open point.

B.

This Defense Is a Sound One.

In addition to our argument, hereinabove, that the point presented has not been foreclosed by any decision of this jurisdiction, there are reasons "for departure from the general doctrine" announced in the Niles decision, the phrase quoted being that of this Court in *Reese, supra*, at 774.

First, the many decisions against the *general* proposition of unconstitutionality, referred to hereinabove, boil down to the rationale of the district court's *Niles* decision, *supra*. If it is vulnerable, it is not a valid basis for any of the decisions using it even on the general proposition;

certainly, for the case at bar, another basis must be found, if any exists, for rejecting the point presented herein.

As noted, Judge Roche's Niles decision does not deal with the argument that is being presented here: that the Thirteenth Amendment is violated by a non-federal labor draft, *absent an emergency*.

There is no doubt we live in a troubled time. But hasn't this been said throughout all history, by many administrators and legislators, and with equal basis?

Does our civilian economy today have emergency need for hospital labor? Is a civilian labor draft required? If it be argued that Congress, by enacting a civilian labor draft has so found, then appellant urges it is the duty of the courts to declare otherwise. It is evident thousands are today engaged in putting more chrome and bigger dorsal and pectoral fins on automobiles. The point need not be belabored. While it is conceded that hospital work is essential, and that work in this field helps the national welfare, where is the proof of an emergency requiring a labor draft?

The Second Circuit, in upholding the conscription of labor in the aforementioned Civilian Public Service Camp pointed out that Congress obviously considered it was "** * * needed during a great national emergency * * **" *Brooks v. United States*, 1945, 147 F.2d 134, 134-135. Note that Brooks arose and was decided during wartime. It is also to be noted that Hoepker (the 7th Cir. decision, *supra*, in the footnote) in rejecting the constitutional attack therein made, refers to "The war power, which is

reserved to Congress, encompasses authority to conscript manpower to defend the nation *during a national emergency* (923) (Emphasis supplied). In the application of the Seventh Circuit's reasoning, with respect to "national emergency" it should be borne in mind that the orders to do civilian work in each of the three cases involved in its Hoepker decision were issued while the Korean emergency was still present: see *Smith, supra*, 409; *Thomas, supra*, 413; *Hoepker, supra*, 121.

The question is this momentous: absent national emergency, may Congress draft civilian labor?

(1)

No other federal labor draft has yet been passed by Congress. The action of the President in taking over the railroads and putting them in the hands of the army to prevent strikes is an evident interpretation of the Thirteenth Amendment, that it must be federal employment to give the power. While this is not directly in point it is of persuasive weight that the Government has no unlimited control over the relationship of private employer and employee but it does over its own employees. It is true that there are laws that authorize federal injunctions against strikes in certain national industries engaged in commerce. But that situation is not in point. The right to strike is one thing. Involuntary servitude is another.

The cases involving the civilian public service camps (*United States v. Brooks*, 54 F. Supp. 995 (S.D.N.Y.), affirmed *Brooks v. United States, supra*, cert. denied 324 U.S. 878; *Weightman v. United States*, 142 F.2d 188 (1st Cir.);

Hopper v. United States, 142 F.2d 181 (9th Cir.); *Zucher v. Osborne*, 54 F. Supp. 984) should be put aside in one broad sweep. It is obvious that such cases did not involve a drafting for private labor for nonfederal agencies, *and all arose during an emergency.*

(2)

Exceptional service such as labor in the federal maritime service or the Navy may be compelled without a violation of the Thirteenth Amendment. It is the same as the right of the federal Government to conscript manpower for military service. A consideration of the cases on the point shows that such services are, like military service, exceptional. They may be compelled as an exception to the general rule commanded by the Thirteenth Amendment.

(3)

The peonage cases are directly in point here.

It was compulsory private labor that was prohibited by the Thirteenth Amendment and the Anti-Peonage Law. In every case there was involved a state law or custom that produced the forced labor for private purpose. Had the laws been passed by the Congress instead of the state governments the results would have been the same. The Thirteenth Amendment would have invalidated the custom or laws even by the Federal Government compelling the work either directly or indirectly.

What is done by the Congress here is identical to that which was done by the state governments and condemned in the peonage cases. Here there is compulsory work of

a nature that does not come within the recognized exception of the Thirteenth Amendment, such as military service. The peonage cases would prohibit the drafting of young men as soldiers and putting them to work on the King Ranch in Texas or in the Broadway Department Store in Los Angeles. Soldiers could not be put in the state hospital to take care of mentally ill people without its being a violation of the principle of the peonage cases by the Supreme Court. Since a soldier cannot be thus drafted for compulsory labor without a violation of the Thirteenth Amendment, then the President also violates the Amendment when he orders a conscientious objector to work in the state hospital. The Amendment and peonage cases prohibit what is done in this case by the order made under Section 1660.1 of the Selective Service Regulations.

A very good discussion of the Thirteenth Amendment, its background and the earlier decisions under it appears in *Pollock v. Williams*, 322 U.S. 4, 7-13. The Court, at page 17 of the opinion, held that the Florida law imposed peonage upon certain persons under certain conditions. The statute made one who obtained an advance of money upon an agreement to render service guilty of a misdemeanor. The law provided for a presumption of fraud on the showing of obtaining the money on such agreement. This case involved the federal act passed to implement the Thirteenth Amendment. It is the law against peonage (322 U.S. at page 8). The Thirteenth Amendment, without a special act, has teeth against an act of Congress. (See *Hurd v. Hodge*, 334 U.S. 24, at pages 31-32). Mr. Justice Jackson for the majority of the Court said:

“The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent with the general basis system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel.” *Pollock v. Williams*, 322 U.S. at pages 17-18.

In the *Slaughter House Cases*, 16 Wall. 36, the Court held that the Thirteenth Amendment was not limited to protection of the Negro or to a prohibition of slavery. See 16 Wall. at pages 69, 71-72.

The other peonage cases, like *Pollock v. Williams*, 322 U.S. 4, lay down the rule that there can be no indirect violation of the Thirteenth Amendment. Criminal sanctions cannot be used to punish one who refuses to do forced labor or violates a labor contract. By force of the same reason the Amendment prohibits the use of the war-powers section of the police power of the state to be used to compel performance of work not of an exceptional character coming strictly under the old common law practice of service to the state of a nature which can be compelled. If the service does not relate directly to the war effort it cannot be said to be exceptional. It is not, therefore, an exception from prohibited forced labor under the Thirteenth Amendment purely because it was attached to war law. It is fundamental that the Constitution deals with realities and not with shadows (*Cummins*

v. *Missouri*, 4 Wall. 277, 325; *Ex parte Milligan*, 4 Wall. 2, 120-121). And there must be a direct relationship between the end aimed at and the power exercised.

Indirect and remote purposes or ends cannot be sustained purely because Congress has chosen to say they are to be done. Compare the other peonage cases (*Baily v. Alabama*, 219 U.S. 219, and *Taylor v. Georgia*, 315 U.S. 25) with *Pollock v. Williams*, 322 U.S. 4.

Hodges v. United States, 203 U.S. 1, involved an indictment seeking enforcement of the criminal sanctions clause of the Civil Rights Act. While the dismissal of the indictments was ordered the court wrote on the subject of "involuntary servitude" words used in the Thirteenth Amendment. The Court said: "The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof." 203 U.S. at pages 16-17.

It is submitted, therefore, that the order for the appellant to perform work at Los Angeles County Department of Charities and the regulations authorizing such order constitute a construction and application of the statute

which makes it unconstitutional, because it is brought into conflict with the mandate of the Thirteenth Amendment.

CONCLUSION.

For the reasons above stated the judgment of conviction should be reversed.

Respectfully submitted,

J. B. TIETZ,

Attorney for Appellant.

May 10, 1959.

No. 16378.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURL MELTON HOWZE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROBERT D. HARNBAKER,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

FILED

JUN 12 1959

PAUL P. O'BRIEN, CLERK

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No. 16378.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURL MELTON HOWZE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

Chief Judge Yankwich found appellant guilty on November 12, 1958, after a court trial in the United States District Court for the Southern District of California, Northern Division, of knowingly failing "to perform a duty required under the Universal Military Training and Service Act and the regulations promulgated thereunder in that he failed and neglected to remain in employment [at the Los Angeles County Department of Charities] for twenty-four (24) consecutive months." [C. Tr. 3-4, 7-8.]* The Court sentenced appellant to the custody of the Attorney General for one (1) year and one (1) day [C. Tr. 7-8]. The District Court had jurisdiction under 18 U. S. C., §3231. Appellant filed notice of appeal on November 19, 1958, within the time prescribed by law [C. Tr. 8-9]. This Court has jurisdiction under 28 U. S. C §1291.

*C. Tr. refers to the Clerk's Transcript of Record.

Statement of the Case.

August 14, 1953. Appellant registered with Local Board No. 77 in Bakersfield, California [SSF 2].*

October 12, 1953. Appellant filed Classification Questionnaire, SSS Form 100, in which he signed Series XIV indicating that he was a conscientious objector [SSF 5-11].

October 26, 1953. Appellant filed Special Form for Conscientious Objector, SSS Form No. 150 [SSF 14-17].

February 16, 1954. Classified I-O, conscientious objector [SSF 3, 12].

May 21, 1957. Ordered to report on June 25, 1957 for Armed Forces physical examination [SSF 24].

June 25, 1957. Found acceptable [SSF 25].

August 19, 1957. Appellant filed Special Report for Class I-O Registrants, SSS Form No. 152, in which he stated he was "conscientiously opposed to any type work under military direction" but "would accept any assignment with [Watchtower Bible and Tract Society]" [SSF 39-42].

September 18, 1957. Appellant asked to indicate his preferences for three types of civilian work contributing to the maintenance of national health, safety or interest [SSF 44].

September 30, 1957. Appellant stated he would not do any of the work offered [SSF 44].

December 3, 1957. Meeting held to find a type of work which appellant would do. He said he would not take any job [SSF 49-52].

*SSF refers to Appellant's Selective Service File, Government Exhibit 1.

June 6, 1958. Appellant ordered to report to the Local Board on June 17, 1958 for instructions to proceed to a place of civilian employment and further ordered to report for such employment and to remain in such employment for twenty-four (24) consecutive months [SSF 60].

June 17, 1958. Appellant reported to Local Board and was instructed to proceed to the Los Angeles County Department of Charities, 1200 North State Street, Los Angeles, California on June 18, 1958 [SSF 12, 63].

June 17, 1958. Appellant reported to the Department of Charities but refused all assignments [SSF 12, 60, 66].

I.

The Local Board Did Not Violate Appellant's Right to Have His Claim for an Agricultural Deferment Considered.

50 App. U. S. C. §456(h) provides that:

“(h) The President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces or from training in the National Security Training Corps of any and all categories of persons whose employment in industry, agriculture, or other occupations or employment, or whose continued service in an Office (other than an Office described in subsection (f) [of this section] under the United States or any State, Territory, or possession, or the District of Columbia, or whose activity in study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors if found to be necessary to the maintenance of the national health, safety, or interest: *Provided*, That no person within any

such category shall be deferred except upon the basis of his individual status: *Provided further*, That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces or for training in the National Security Training Corps under the provisions of section 4(a) of this Act [section 454(a) of this Appendix] until the thirty-fifth anniversary of the date of their birth.”

32 C. F. R. §1622.24 provides that:

“(a) In Class II-C shall be placed any registrant who is employed in the production for market of a substantial quantity of those agricultural commodities which are necessary to the maintenance of the national health, safety, or interest, but only when all of the conditions described in §1622.23(a) are found to exist.

“(b) The production for market of a substantial quantity of agricultural commodities should be measured in terms of the average annual production per farm worker which is marketed from a local average farm of the type under consideration. The production of agricultural commodities for consumption by the worker and his family, or traded for subsistence purposes, should not be considered as production for market. Production which is in excess of that required for the subsistence of the farm families on the farm under consideration should be considered as production for market.”

32 C. F. R. §1622.23(a) states that:

“. . . a registrant's employment in industry or other occupation, service in office, or activity in re-

search, or medical, scientific, or other endeavors, shall be considered to be necessary to the maintenance of the national health, safety, or interest only when all of the following conditions exist:

“(1) The registrant is, or but for a reasonal or temporary interruption would be, engaged in such activity.

“(2) The registrant cannot be replaced because of a shortage of persons with his qualifications or skill in such activity.

“(3) The removal of the registrant would cause a material loss of effectiveness in such activity.”

The appellant stated only:

(1) That he was working as a “Farm laborer (Employed under jurisdiction of my Father)”;

(2) That he did “various farm work”;

(3) That there were “about 3” other year-round workers on the farm;

(4) That the “about 3” other workers and himself raised 28 acres of alfalfa, 77 acres of cotton, 15 cattle, 13 hogs and 4 horses [SSF 5-11].

Appellant had the burden of showing his eligibility for deferment. As this Court said in *Sullivan, Commanding Officer v. Swatzka*, 148 F. 2d 965, 966 (9th Cir. 1945), *cert. den.* 326 U. S. 752 (1945):

“Petitioner’s position appears to be that claim for agricultural deferment must be granted unless the local board is presented with evidence contradictory to that offered by the registrant. But the boards have no facilities for assembling evidence. The board

members are non-paid citizens of the community, and one claiming deferment must establish to the satisfaction of his board that he is entitled to it."

See also *Sisquoc Ranch Co. v. Roth*, 153 F. 2d 437, 441 (9th Cir. 1946).

Did appellant establish that he was employed in the production for market of "a substantial quantity" of those agricultural commodities which are necessary for the maintenance of the national health, safety or interest?

Did appellant establish that he could not be replaced "because of a shortage of persons with his qualifications or skill?"

Did appellant establish that his removal would cause "a material loss of effectiveness" in agricultural activity?

The Government thinks not.

The appellant only said that he was a farmer. This was not enough.

Imboden v. United States, 194 F. 2d 508, 512 (6th Cir. 1952), *cert. den.* 343 U. S. 957 (1952);

United States ex rel. Lawrence v. Commanding Officer of McCook Army Air Field, 58 Fed. Supp. 933, 943 (D. Nebr. 1945).

In *Dickinson v. United States*, 346 U. S. 389, 395 (1953), the Court held that *Dickinson* "made out a case which meets the statutory criteria [for a minister]." Here, the appellant did not make out a case which met the criteria for agricultural exemption, as previously pointed out. In any event, *Dickinson* is applicable only to claims for ministerial deferment.

Witmer v. United States, 348 U. S. 375, 381-382 (1955).

Significantly, appellant cites no cases extending *Dickinson* to claims for agricultural deferment.

Appellant says: "Worse yet, there is nothing to indicate that his claim [for agricultural deferment] was even considered" (App. Br. p. 5). But 32 C. F. R. §1622.1(c) provides that the local board will receive and consider all information presented to it. And there is a presumption that the board has done its duty. As the Court said in *Sisquoc Ranch Co. v. Roth, supra*:

"The original classification is not made after a hearing, either upon or without notice, but is fixed primarily from information contained in the registrant's returned questionnaire and the relative needs in the various services essential to the war effort. The presumption, of course, is that the board, when it has acted, has done its duty and has correctly fixed the classification. No hearing is provided for except '. . . to hear and determine . . . all questions or claims with respect to inclusion for, or exemption or deferment from, training and service . . . ' 50 U. S. C. A. Appendix, §310(a)(2). That is, hearings are held after classification and upon protest or request, as is accurately put in Selective Service Regulations §625.1(a):

"Every registrant, after his classification . . . shall have an opportunity to appear in person before the member or members of the local board . . . if he files a written request therefor within 10 days after . . . Notice of Classification . . . (b) No person other than the registrant may request an opportunity to appear before the local board"* (p. 440).

*Similar provisions are now in 32 C. F. R. §§1623.1(b) and 1624.1.

So the presumption is that the local board considered the information in appellant's classification questionnaire and then classified him I-0 [SSF 3, 5-11]. Appellant asked for no hearing and he took no appeal. He did not exhaust his administrative remedy.

Skinner v. United States, 215 F. 2d 767 (9th Cir. 1954), *cert. den.* 348 U. S. 981 (1955).

II.

There Was Sufficient Evidence to Show That Defendant Was Guilty as Charged in the Indictment.

An indictment charging a violation of the Universal Military Training and Service Act in substantially the language of the statute is sufficient.

Warren v. United States, 177 F. 2d 596, 600 (10th Cir. 1949), *cert. den.* 338 U. S. 947 (1950);

Stassi v. United States, 152 F. 2d 581, 582 (5th Cir. 1946), *cert. den.* 328 U. S. 842 (1946);

Zuziak v. United States, 119 F. 2d 140, 141 (9th Cir. 1941);

United States v. Shibley, 112 Fed. Supp. 734, 745 (S. D. Cal. 1953).

50 App. U. S. C. §462(a) provides that:

“Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-454 and 455-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . and any person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or

rules, regulations, or directions made pursuant to this title [said sections], . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment.”

50 App. U. S. C. §456(j) further provides:

“Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any

such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix].”

The indictment charged that defendant was ordered by his local board

“to report on June 17, 1958, to said Local Board . . . to be given instruction to proceed to a place of employment for civilian work contributing to the maintenance of the national health, safety and interest; and defendant was further ordered . . . to report for such employment pursuant to said instructions and to remain in such employment for twenty-four (24) consecutive months . . . ; that defendant reported to [the] Local Board . . . on June 17, 1958 and was instructed to proceed and report to the Los Angeles County Department of Charities, 1200 North State Street, Los Angeles, California, . . . on June 18, 1958 for work as an institutional worker in lieu of induction; that defendant reported to the Los Angeles County Department of Charities, at the time and place so ordered, and at said time and place the defendant knowingly failed and neglected to perform a duty required of him under the Universal Military Training and Service Act and the regulations promulgated thereunder in that he failed and neglected to remain in employment for twenty-four (24) consecutive months” [C. Tr. 3-4].

So the indictment was substantially in the words of the statute, although more specific.

The indictment sufficiently apprised the appellant of the offense intended to be charged.

United States v. Sutter, 127 Fed. Supp. 109, 114
(S. D. Cal. 1954).

Appellant submits that "an indictment couched: 'failure to perform a duty required under the act' would be too vague, for the act imposes many dozen duties. This should need no argument" (App. Br. p. 6). But our indictment is not so couched. Our indictment sets forth an order of the local board to report to the Department of Charities in Los Angeles for civilian work on June 18, 1958, and to remain in such employment for 24 months. It charges that on June 18, 1958 and in Los Angeles, California, the defendant failed and neglected to perform a duty required of him under the Universal Military Training and Service Act in that he did not remain in such employment. Thus, our indictment sets out a specific duty and it sets out the specific time and the specific place that appellant failed to perform part of that duty.

The evidence showed that appellant "reported to the Los Angeles County Department of Charities . . . on June 17, 1958, for work under the conscientious objector program," [SSF 66] but "refused all assignments" [SSF 60].

So the defendant did not fail to carry out the first part of his duty: to report for civilian work. He now claims that he did not fail to carry out the second part of his duty: to remain in employment, because, as he says, he "had not started his employment" (App. Br. p. 6). In other words, the appellant claims that by reporting and refusing all assignments he found a niche where he could safely rest without having failed to perform either part of his duty.

The Government's position is simply this: when a registrant reports for employment he begins that employment even though he has not been given an assignment. He begins his employment by being available. And when he refuses his first assignment he has failed to remain in employment.

Defendant is fully protected from the "hazard of a future indictment," because the local board's order [SSF 60] "could only be the basis of one conviction . . . [although] they directed the registrant to perform two duties."

Johnston v. United States, 351 U. S. 215, 222 (1956).

III.

The Universal Military Training and Service Act Does Not Violate the Thirteenth Amendment.

The heading for Part III of Appellant's Brief states that:

"The Act, As Construed and Applied by the Regulations and the Order to Report for Civilian Work Is in Violation of the Thirteenth Amendment of the United States Constitution Because It Calls for a Private, Non-Federal Labor Draft for the Performance of Services That Are Neither Exceptional nor Related to National Defense in Time of War or During a Declared Emergency."

This statement should be compared with these facts:
May 8, 1945, Germany surrendered. 59 Stat. 1857.
September 2, 1945, Japan surrendered. 59 Stat. 1733.

December 31, 1946. President proclaimed the cessation of hostilities, adding that "a state of war still exists." 61 Stat. 1048.

October 19, 1951. Joint Resolution of Congress and Presidential Proclamation ending the war with Germany. 65 Stat. 451 and 66 Stat. C3.

April 28, 1952. Effective date of the Japanese Peace Treaty. 66 Stat. C31.

December 16, 1950. President issued Proclamation No. 2914 as follows:

"WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

"WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world, and

"WHEREAS, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

“WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United State be strengthened as speedily as possible:

“NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency, which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace.

“I summon all citizens to make a united effort for the security and well-being of our beloved country and to place its needs foremost in thought and action that the full moral and material strength of the Nation may be readied for the dangers which threaten us.

“I summon our farmers, our workers in industry, and our businessmen to make a mighty production effort to meet the defense requirements of the Nation and to this end to eliminate all waste and inefficiency and to subordinate all lesser interests to the common good.

“I summon every person and every community to make, with a spirit of neighborliness, whatever sacrifices are necessary for the welfare of the Nation.

“I summon all State and local leaders and officials to cooperate fully with the military and civilian defense agencies of the United States in the national defense program.

"I summon all citizens to be loyal to the principles upon which our Nation is founded, to keep faith with our friends and allies, and to be firm in our devotion to the peaceful purposes for which the United Nations was founded.

"I am confident that we will meet the dangers that confront us with courage and determination, strong in the faith that we can thereby 'secure the Blessings of Liberty to ourselves and our Posterity.' "

The Universal Military Training and Service Act, 62 Stat. 604, 50 App. U. S. C. §§451-473, was enacted on June 24, 1948. Therefore the United States has been in a state of war or national emergency at all times since its enactment.

The assumption that there was no emergency when the appellant was ordered to report for civilian work underlies all of Part III of Appellant's Brief. For example, at page 13, he states that "It should be borne in mind that the orders to do civilian work in each of the three cases involved in the Hoepker decision were issued while the Korean emergency was still present: see *Smith, supra*, 409; *Thomas, supra* 413; *Hoepker, supra*, 121." He then goes on: "The question is this momentous: absent national emergency, may Congress draft civilian labor?"

Appellants' error is this: the so-called Korean emergency exists today and has existed continuously since December 16, 1950. I say so-called Korean emergency because the President more aptly described it as an emergency caused by the "increasing menace of the forces of communist aggression," a menace which has grown, not diminished, since the Korean War, and which, ironically, threatens the "blessings of the freedom of worshipping."

The power of Congress to pass selective service laws is based on the war powers in Article 1, §8 of the Constitution which provide that:

“The Congress shall have Power . . .

* * *

“To declare War, . . .;

“To raise and support Armies, . . .;

“To provide and maintain a Navy;

* * *

“To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

The Act of May 18, 1917, entitled “An Act to authorize the President to increase temporarily the Military Establishment of the United States,” 40 Stat. 76, was held to be proper exercise of the war powers and not to violate the Thirteenth Amendment.

Selective Draft Law Cases, 245 U. S. 366, 390 (1918).

The Selective Training and Service Act of 1940, 54 Stat. 885, was held to be a proper exercise of the war powers and not to violate the Thirteenth Amendment.

Hopper v. United States, 142 F. 2d 181, 186 (9th Cir. 1944);

Roodenko v. United States, 147 F. 2d 752, 754 (10th Cir. 1944), *cert. den.* 324 U. S. 860 (1944).

Also, the Universal Military Training and Service Act of 1948, 62 Stat. 604, was held to be a proper exercise

of the war powers and not to violate the Thirteenth Amendment.

Pomorski v. United States, 222 F. 2d 106, 107 (6th Cir. 1955), *cert. den.* 350 U. S. 841 (1955);

United States v. Wenner, 134 Fed. Supp. 447, 450 (M. D. Pa. 1955), *affm'd.* 234 F. 2d 71 (3d Cir. 1956), *cert. den.* 352 U. S. 908 (1956).

The war powers are not limited to wartime. They include the power to draft men in time of peace.

United States v. Henderson, 180 F. 2d 711, 713 (7th Cir. 1950), *cert. den.* 339 U. S. 963 (1950);

Richter v. United States, 181 F. 2d 591, 592-3 (9th Cir. 1950), *cert. den.* 340 U. S. 892 (1950).

Nor are they limited to periods of declared emergency. This is pointed out by appellant's quotation from the *Richter* case at page 11 of his Brief. Said the Court: "Congress has the power to compel military service of a citizen in peacetime or wartime, *whenever it declares it is necessary* or that an emergency exists requiring the raising of an army." Congress has declared that such service is necessary in Sections 1(b) and (c) of the Universal Military Training and Service Act of 1948, 62 Stat. 604, 50 App. U. S. C. §451(b) and (c), as follows:

"(b) The Congress declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation.

"(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a sys-

tem of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.”

Since Congress can draft men in peacetime, they can also require that registrants having conscientious objection to war perform civilian work contributing to the national welfare in lieu of induction. Perhaps the best statement of this point is in *Roodenko v. United States*, 147 F. 2d 752, 753-4 (10th Cir. 1944), *cert. den.* 324 U. S. 860 (1944). There, the defendant was called up under the 1940 Act and assigned to civilian work of national importance. He was convicted of refusing to perform that work. Roodenko claimed that Section 5(g) of the Act was invalid because it subjected him to involuntary servitude in violation of the Thirteenth Amendment. The court said:

“There is no constitutional right of exemption from service in our armed forces on account of religious training or conscientious scruples against participation in war, or for any other reason. This principle is too well settled to need any extended discussion or the citation of a great number of cases. There are none holding to the contrary.

* * * * *

“If Congress, as we have held, has the power to compel conscientious objectors to serve in the military forces, they cannot be heard to complain that they are relieved from such service on condition that they nevertheless recognize their obligation of citizenship and respond to call and serve their country in non-military work of national importance, under civilian authority. Congress could have required Roodenko to serve in the armed forces. Having no constitutional right of exemption from such service, he cer-

tainly can have no constitutional grounds to challenge the validity of an Act which gives him a conditional exemption from a service which he could be compelled to perform.”

In *United States v. Hoepker*, 223 F. 2d 921, 923 (9th Cir. 1955), *cert. den.* 350 U. S. 841 (1955), the question came up under the 1948 Act. Said the Court:

“The argument based on the Thirteenth Amendment has been disapproved by several courts. *United States v. Pomorski*, D. C., 125 F. Supp. 68, affirmed 6 Cir., 222 F. 2d 106; *United States v. Niles*, D. C., 122 F. Supp. 382, affirmed 9 Cir., 220 F. 2d 278; *United States v. Sutter*, D. C., 127 F. Supp. 109; *United States v. Kinney*, D. C., 125 F. Supp. 322; *United States v. Hoepker*, D. C., 126 F. Supp. 118; *United States v. Smith*, D. C., 124 F. Supp. 406; *United States v. Thomas*, D. C., 124 F. Supp. 411. We agree with the postulate on which these decisions are based that assignment to a non-federal hospital does not constitute involuntary servitude. In our ardor to preserve individual civil rights pursuant to the mandate of the Constitution, we are prone to lose sight of the duties which every citizen owes his nation and his government under that document. The war power, which is reserved to Congress, encompasses authority to conscript manpower to defend the nation during a national emergency. *Selective Draft Law Cases (Arver v. U. S.)*, 245 U. S. 366, 38 S. Ct. 159, 62 L. Ed. 349. A necessary correlative is the duty of all Americans to serve when called. The strength and vitality of a nation is measured by criteria broader than a numerical count of its men-at-arms. On receipt of the I-O classification, by grace

UNITED STATES COURT OF APPEALS
IN AND FOR THE NINTH CIRCUIT.

No. 16,378.

BURL MELTON HOUZE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING.

Comes now the appellant, by his attorney, and files this his Petition for Rehearing of the judgment entered by the Court on November 19, 1959, affirming the judgment of the Court below.

Appellant reserves his argued position as to each of the points of appeal, but in this Petition addresses himself solely to a feature of the decision wherein he believes the Court may be convinced its result is incorrect.

This Court's opinion decided the agricultural deferment claim, after reciting the pertinent regulations, and the facts, as follows:

"It is apparent that the facts submitted by the registrant did not make out a prima facie case for a classification of essential farm worker."

Appellant believes the Court did not intend to hold, as it did by implication, that a farm of 77 cotton acres, 22 alfalfa acres, various livestock, and where "the value of the farm products sold the previous year had been \$15,000.00" was within the proscription of the opinion-recited regulation, namely, one where the result of the family effort was merely "the production of agricultural commodities for consumption by the worker and his family, or traded for subsistence purposes, and should not be considered as production for market * * *."

True, in the eyes of many, a \$15,000.00 family income is not much more than mere subsistence; yet the smaller farm, one of a \$15,000.00 cash income, is unquestionably a substantial contributor of agricultural commodities.

The economic contribution of the small farm cannot be ignored; for one thing, as Lincoln said of the common people, there are so many of them. The statistics readily available have not given petitioner a complete picture on relative production. With respect to number, however, we learn from Extension Economist Carpenter, in his November, 1958, extension course pamphlet from Berkeley entitled "Can Farmers be Guaranteed Cost of Production" that in 1955 there were 4,782,416 farms in the United States of which 65% were less than 100 acres in size; 123,074 farms in California, of which 63% were less than 100 acres in size.

With respect to cotton production in California the 1954 federal "Census of Agriculture"¹ states 9,846 farms reported on cotton, representing 874,559 acres.

1. 1954 Census of Agriculture, U. S. Department of Commerce, Bureau of Census, Washington, 1956, page 41.

A. The number of farms in the above 9,846, *under* 100 acres was 7,900. In the next bracket, farms of 100-199 acres, there were 1,043; thus there were only 903 reporting farms over 199 acres in size, raising cotton in California.

B. The quantity harvested by the above 9,846 farms was 1,456,553 bales. The breakdown, by bales, is, to 499 bales, 9,279 farms; 499-up bales, 903 farms (why this adds up to more farms than the number listed as reporting we do not know). We could not learn the relative values of the cotton produced by the "large" or the "small" farms after extensive reading and conversations in Los Angeles. Letters have been sent to Sacramento and Berkeley people who, it is believed, can give authoritative opinions on the point. Therefore, if this line of argument is impressive to the court (as it is to counsel, who is confident it can be developed as indicated) it is requested that decision on the petition be delayed a week, thus permitting petitioner to submit photocopies of the expected answers.

Wherefore, upon the foregoing grounds, and for other reasons appearing in Appellant's Brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this Petition.

Counsel further represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. TIETZ,
Attorney for Appellant.

No. 16379. /

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE COLLINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,

United States Attorney,

PHILIP T. WHITE,

Attorney, Department of Justice,

600 Federal Building,

Los Angeles 12, California,

Attorneys for Appellee.

FILED

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No. 16379.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE COLLINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

Judgment of conviction was entered on October 8, 1958 [R. 31].¹ Notice of appeal was duly filed on October 17, 1958 [R. 33-34]. The District Court had jurisdiction of this case pursuant to Title 18, Section 401 of the United States Code. The jurisdiction of this Court is invoked under Title 28, Section 1291 of the United States Code.

Statute Involved.

Section 401 of Title 18 of the United States Code provides in pertinent part as follows:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; * * *.

¹"R" refers to the Transcript of Record. "Tr." refers to the Reporter's Transcript of Trial Proceedings.

Statement of the Case.

Appellant's Statement of the Case is uncontroverted, except as to "C. Questions Presented and How Raised," which is controverted.

The question presented is whether there is substantial evidence to sustain the District Court's finding that appellant's contumacious conduct constituted a criminal contempt by obstructing the administration of justice.

ARGUMENT.

A. The Applicable Law.

The Government agrees that perjury alone is not punishable as contempt and that to be so punishable there must be the further element of obstruction to the performance of judicial duty beyond that inherent in the perjurious character of the testimony. *Ex parte Hudgings* (1919), 249 U. S. 378, 63 L. Ed. 656, 39 S. Ct. 337. This view was explicitly reaffirmed in *In re Michael* (1945), 326 U. S. 224. Both the *Hudgings* and *Michael* cases, however, recognize that the fact that perjury is involved does not preclude a prosecution for contempt. As *Hudgings* states (249 U. S. at 282, 283):

* * * Because perjury is a crime defined by law and one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional circumstances so justify, be the subject matter of a punishment for contempt.

* * * * *

* * * in order to punish perjury in the presence of the court as a contempt there must be added to the

essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. As illustrative of this see *United States v. Appel*, 211 Fed. Rep. 495. * * *

In *Ex parte Michael* (326 U. S. at 228) this view is stated as follows:

* * * Of course, the mere fact that the false swearing is an incident to the obstruction charged does not immunize the culprit from contempt proceedings. * * *

The basic teaching of *Hudgings* and *Michael*, therefore, is that an obstruction to the performance of judicial duty resulting from an act done in the presence of the court is the characteristic upon which the power to punish for contempt must rest. This element was not found in *Hudgings* for as the Supreme Court said at page 382:

Despite some confusion caused by certain ambiguous forms of expression used by the court below in dealing with the subject, *it is indisputable that the punishment for contempt was imposed solely because of the opinion of the court that the witness was willfully refusing to testify truthfully, that is, was committing perjury.* * * * (Emphasis supplied.)

Again at page 384:

Testing the power to make the commitment which is under consideration in this case by the principles thus stated, we are of opinion that the commitment was void for excess of power—a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone, without reference to any circumstance or condition giving to it an obstructive effect. (Emphasis supplied.)

Nor was this element found in *Michael* for as the Supreme Court stated there at pages 228-229:

Here there was, at best, no element except perjury "clearly shown." Nor need we consider cases like *United States v. Appel*, 211 F. 495, 496, pressed upon us by the government. For there the Court thought that the testimony of Appel was "on its mere face, and without inquiry collaterally, . . . not a bona fide effort to answer the questions at all." In the instant case there was collateral inquiry; the testimony of other witnesses was involved to convince the trial judge that petitioner was a perjurer. Only after determining from their testimony that petitioner had willfully sworn falsely, did the Court conclude that petitioner was "blocking the inquiry just as effectively by giving a false answer as refusing to give any at all." * * *

Thus, *United States v. Appel*, 211 Fed. 495, which was given explicit endorsement in *Hudgings*, and which more recently the Supreme Court took pains to distinguish in *Michael*, deals with a situation where the element of obstruction was thought by the Supreme Court to be sufficient to justify punishment of the witness for contempt. In that case, the witness was examined as to what he had done with various substantial sums of money which he had withdrawn from his account shortly before his grand jury testimony. He first answered that he did not remember and later that he lost various amounts at gambling. Judge Learned Hand, in sustaining a charge of contempt, stated the essence of the matter as follows (211 Fed., at 495):

The power of the court to treat as a criminal contempt a persistent perjury which blocks the inquiry is settled by authority in this circuit. * * * It is indeed impossible logically to distinguish between the

case of a downright refusal to testify and that of evasion by obvious subterfuge and mere formal compliance.

The rule, I think, ought to be this: If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like anyone else who is in earnest, ought not be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept the night before if he was sane or sober, or that he could not tell whether he had been married more than a week. If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry. Nevertheless, this power must not be used to punish perjury, and *the only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a bona fide effort to answer the questions at all.* (Emphasis supplied.)

The *Appel* test, of whether on its face, and apart from inquiry collaterally, the testimony was not a bona fide effort to answer the question at all, has been applied in a number of other decisions. See, *e. g.*, *In re Meckley*, 137 F. 2d 310 (C. A. 3), certiorari denied, 320 U. S. 760, where the court, in sustaining the contempt conviction had this to say at page 311:

What the court did was to conclude from a reading of the defendant's answers to the questions asked him before the grand jury that, on the whole, he had been evasive, reluctant and dissembling for the intended

purpose of obstructing the grand jury from ascertaining anything from him concerning the matter under inquiry as to which he was obviously in possession of knowledge and that such was indeed the quite evident effect of his conduct. We think it is clear that such conduct amounts to contumacy. (See also opinion in District Court, 50 Fed. Supp. 274, 275-277 (M. D. Pa.).)

The federal cases abound with decisions in which obstructive, evasive and contumacious answers have been held to be contemptuous of judicial authority and which have been held to obstruct the administration of justice. Examples of these are as follows:

(1) When the witness' testimony is considered in connection with the known and undisputed circumstances, it is self-evident that the witness did deliberately try to thwart the purpose of the investigation. (*Schleir v. United States*, 72 F. 2d 414, 417 (C. A. 2).)

(2) When the witness has admitted at many places in evidence that earlier answers given by him were not true. (*United States v. McGovern*, 1 Fed. Supp. 568, 569 (S. D. N. Y.).)

(3) When a witness resorts persistently to subterfuge and evasion, if not to deliberate falsifying, to prevent a disclosure of what knowledge he had and was asked to give. (*United States v. McGovern*, 60 F. 2d 880, 890 (C. A. 2).)

(4) When a witness disclaims any knowledge about what he must in the nature of things have known. (*Loubriel v. United States*, 9 F. 2d 807, 808 (C. A. 2).)

(5) When the answers of a witness are trifling and he resorts to shifts and subterfuge in the place of truth. (*Loubriel v. United States (supra)*.)

(6) When the answer of a witness tends to block the inquiry by the first preposterous fancy which he chooses to put forward. (*Loubriel v. United States supra*.)

(7) When the witness' testimony is an evasion by obvious subterfuge and mere formal compliance. (*United States v. Appel*, 211 Fed. 495.)

(8) When a witness parries with the examiner, refuses to state his best recollection, or manifests a determination not to give his best recollection of facts about which he is being interrogated. (*O'Connell v. United States*, 40 F. 2d 201, 205 (C. A. 2).)

It is submitted that the evidence in this case, discussed hereinafter, meets virtually all of the above tests. In a criminal contempt proceeding, the district court must be convinced of the witness' guilt beyond a reasonable doubt. (*Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418, 444; *In re Eskay*, 122 F. 2d 819, 822 (C. A. 3); *Russell v. United States*, 86 F. 2d 389, 394 (C. A. 8); *United States v. Dachis*, 36 F. 2d 601, 603 (C. A. 2).) But where the court makes a finding to that effect, as the District Court did here [Tr. 351-353], the function of an appellate court, as in any criminal case, is merely to determine whether the finding is supported by substantial evidence. (*Toledo Newspaper Co. v. United States*, 247 U. S. 402, 420; *Meckley (supra)*; *Kelton v. United States*, 294 Fed. 491, 494; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 338; *Green v. United States* (1958), 356 U. S. 165, 179.)

B. The Evidence.

The Government's evidence consisted of the entire testimony of appellant before the Grand Jury on April 16, May 23, July 14 and July 25, 1958, which was introduced into evidence through the official court reporters. [Exs. 2, 4, 5, 6, 7.] In addition, the foreman of the Grand Jury, Robert E. Battles, testified in substance as follows:

Appellant appeared as a witness before the Grand Jury in connection with the murder on October 28, 1957 of one Cecil Thomas, who was to have appeared as a Government witness in federal court the next day, October 29, 1957 [Tr. 73-74]. Appellant first appeared as a witness before the Grand Jury on April 16, 1958 [Tr. 77] and he later appeared before it on May 23, July 14 and July 25, 1958 [Tr. 78]. Appellant did not refuse to answer any questions [Tr. 88] but his demeanor was at times "surly" and "smart alecky" though this was not a prevalent attitude throughout his testimony [Tr. 89]. Appellant was not informed by the Grand Jury of the nature of its inquiry [Tr. 77-78], and the inquiry continued after July 25, 1958 [Tr. 78]. When appellant testified before the Grand Jury on April 16, 1958, the Grand Jury did not have any information as to anything that had been told to Mr. Schauer, two Treasury Agents and Mr. Goldschein in the office that morning [Tr. 84-85]. The Grand Jury did not have any information subsequent to that that appellant did not tell the story to Mr. Schauer, Mr. Goldschein and two Treasury Agents [Tr. 87-88].

Appellant offered no testimony at the trial in his defense.

The sole question before the Grand Jury then was the murder of Cecil Thomas, who was shot to death on the

day before he was to have been a witness in federal court. Appellant was called before the Grand Jury for the purpose of determining his knowledge of this murder. The presentment charges that appellant told the Grand Jury several conflicting stories concerning the murder of Cecil Thomas [R. 3-11]. For purposes of clarity these are denominated in Appendix A² as (1) The Burglary Story; (2) The Story about the Loan of \$250; and (3) The Three Men Story. The presentment also charges that appellant told the Grand Jury many other conflicting stories in the course of his testimony. These are also denominated in Appendix A under the following headings: (4) Length of Time Appellant had known Thomas; (5) How Appellant came to know Thomas; (6) Number of Times Appellant was in Thomas' House; (7) Appellant's use of Narcotics; (8) Appellant's knowledge of quantities of Heroin; (9) Appellant's purchases of Heroin; (10) Appellant's description of car.

In order to determine whether there was an obstruction to the administration of justice, the factual question of what appellant said that the Grand Jury complained of as an obstruction must be examined. The Grand Jury set forth in its presentment some of the highlights of appellant's testimony to call the Court's attention to its complaint, but it expressly made the entire transcript of his testimony before it a part of the presentment as evidence of its obstructive tendency [R. 11-12].

Since the giving of evasive and obstructive answers seldom appears from a single answer or from a small portion of a witness's testimony, and only by considering

²The pertinent portions of appellant's testimony before the Grand Jury are set out in Appendix A which is referred to hereinafter as "App. A."

a large number of questions and answers will such obduracy become apparent, let us consider certain portions of appellant's testimony which highlight the grossness of his contempt.

In his first appearance before the Grand Jury on April 16, 1958, appellant testified that he was confined in the penitentiary and that he entered a plea of guilty to the murder of Cecil Thomas (App. A-1). He further testified that on October 28, 1957, after determining that no one was at home, he entered the home of Cecil Thomas by taking a rear screen off, and while he was in the process of burglarizing Thomas' home, Thomas came in through the front door; that while he, appellant, was in the kitchen at the rear of the house, Thomas, after entering the house, went into his room or the rest room. Appellant heard Thomas "cut a light on" and then Thomas came toward the kitchen and at that time appellant stepped out and told Thomas not to move, and Thomas asked what was this and jumped toward appellant and appellant shot Thomas, who fell forward (App. A, 1-2).

However, on the same day, April 16, 1958, appellant testified to a contradictory story, that is, that he told Mr. Schauer, two Treasury Agents, and Mr. Goldschein in their office that morning that Thomas had called him and told him to come over to his house as soon as he could if he wanted to make some money; that he went to Thomas' house and upon his arrival Thomas asked him if he would like to make "a half a piece of stuff." Then appellant asked him what he would have to do, and Thomas told him to stay there with him that night. Appellant further testified that at this point Thomas asked him if he heard someone walking toward the back of the house and asked him to take a look, which he did. Appellant said that as he stepped out the back doorway someone twisted

his neck, frisked him and took his gun. Another man took him from the rear of Thomas' house to a car parked out front and after that he heard two shots and one of the men came running from the house and got in the car and they drove off (App. A, 7-8).

On the same day, April 16, 1958, appellant further continued his testimony and gave a third version of the murder of Thomas. When asked why he went to Thomas' house, appellant said that he had given Thomas some money earlier that week and that Thomas had been putting him off; that he just went over to Thomas' house and told him that he had to have some money "or stuff." Thomas went into his bedroom and came back with a 30-30 rifle and told him to leave the house (App. A-4). However, appellant abandoned this story when asked:

"Q. Don't you know that when Cecil Thomas was found dead on the floor that he had a clothes brush in one hand and some trousers and a hanger—
A. Yes,

Q. —on top of him? A. Yes. That's what the officers told me" * * * (App. A, 5).

On the same day, shortly after the foregoing testimony, appellant was asked "Which story is true now?" and appellant answered, "The one I told you in the office this morning," and went on to testify to this version of the murder of Cecil Thomas, to wit: That Thomas called him and asked him if he would like to make some money. He said he would and that he would get to Thomas' house as soon as he could. He got there about 8:30 or 9:00 o'clock. He and Thomas were in the living room when Thomas asked him if he heard somebody walking outside and asked him to take a look. Appellant testified that as he looked out through the back doorway, someone pushed

his head to one side and put a revolver "in the back of my neck" and told him, "Don't move, buddy boy." At that time they frisked him and got his .38 caliber revolver and one of them took him to the car. He was not sure, but he thought another man went into the house. About two minutes later, he heard two shots and one of the men came running back and got in the car and they drove off. The two men in the back seat were white and the one in the front seat he could not see because his cap had been pulled down over his eyes as he got into the car. He sat on the back seat with a heavy set man on his right and another man on his left. They dropped him off somewhere on the other side of Washington Street, gave him a thousand dollars, and told him to keep his mouth shut or something would happen to his kids. The heavy set one on his right gave him the gun, opened the door and appellant got out (App. A, 8-12).

When appellant appeared before the Grand Jury on July 14, 1958, he was asked why, when he was first brought to Mr. Goldschein's office, he had told Messrs. Schauer, Warner, Smith and Goldschein that Thomas called him on the phone, telling him to come to his house with his pistol—The Three Men Story—and when he first went into the Grand Jury room he told the burglary story. Appellant answered that as far as he was concerned this was the true story—that is what he was tried and convicted of. When asked whether he meant that the burglary story was the true story, he answered, "Well, what do you want me to mean?" He then testified that the story about the three men in the car was the true story (App. A, 13-14).

In addition to these three antithetical versions told by appellant of the murder of Cecil Thomas, which could have no other design or effect than to block the inquiry of the

Grand Jury, appellant told the Grand Jury many other conflicting stories of facts ancillary to the main inquiry which demonstrate his contumacious conduct. For example, on April 16, 1958, appellant testified that he had known Thomas for three or four months. Later the same day he said he had known him for about four or five months. On May 23, 1958, he testified that he had known Thomas three or four years at the most before the day of the murder. Finally, on July 25, 1958, he testified that he did not remember how long before the day of the murder he had met Thomas, but later that day he said that he had known him for about four years (App. A-17).

Again, on April 16, 1958, appellant testified that he was in Thomas' house once—"That's when I shot him." However, on July 25, 1958, he testified that he had been in Thomas' house once before (App. A, 18-19).

Concerning his use of narcotics, appellant testified on April 16, 1958, that he used heroin and had a habit of about "two spoons" a day that cost him about forty or fifty dollars a day; that he spent the thousand dollars that he got from the three men in the car to buy narcotics and a few clothes. However, on July 14, 1958, he testified that "a spoon" would last him a month. On July 25, 1958, he testified that he never stated before the Grand Jury that he was addicted to heroin or that he had a habit of twenty or forty dollars a day, but said that he testified that he would get "a spoon" of heroin that would cost him twenty-five dollars that would last him some time (App. A, 19-20).

Concerning his knowledge of quantities of heroin, appellant testified on April 16, 1958, that half a piece of stuff (heroin) is half an ounce more or less, and the number of spoons in an ounce depended on how much the

heroin had been cut. However, on July 14, 1958, he testified that he did not know how much a half a piece was; that he was not that familiar with narcotics. On the same day he also testified that he bought six or seven spoons of heroin at a time from Walter Alexander (App. A, 20-21).

Concerning his purchases of heroin, appellant testified on April 16, 1958, that he had never bought any narcotics from "Big J." On May 23, 1958, he testified that he also purchased heroin from "Big J.", Walter Alexander, Shirley, Marie and Don Newton (App. A, 22-23).

With respect to the car involved in the "Three Men Story," appellant first testified that it was a 1956 or 1957 grey Ford. But on July 25, 1958, all he would say about the car was that it was a four-door medium sized car (App. A, 24).

Appellant's testimony concerning other details of the "Three Men Story" was so contradictory as to expose it on its face as a preposterous fancy. For example, he gave varied versions about the money received from the three men in the car. On April 16, 1958, he testified that one of the three men gave him one thousand dollars (App. A, 9). However, on May 23, 1958, he said that one of the men gave him five hundred dollars (App. A, 12). But on July 14, 1958, he testified that he could not remember whether the amount was five hundred or one thousand dollars; that he never had as much as five hundred or one thousand dollars in his possession before at one time (App. A, 14-15).

C. Conclusion From the Evidence.

The transcript of appellant's testimony before the Grand Jury plainly supports the District Court's finding that appellant was guilty of contempt by obstructing the Grand Jury's investigation. Almost all of appellant's testimony before the Grand Jury was conflicting, incapable of belief, evasive, misleading, or false and amounted to a concealment of material facts. The whole transcript of his testimony from beginning to end shows by his attitude, his conduct and his contradictory statements that it was intended to block the Grand Jury in its inquiry.

The District Court, in finding that appellant's guilt was shown beyond a reasonable doubt [Tr. 351-353], had this to say:

Of course, the question here, as I view it, is not whether the stories he told are shown beyond a reasonable doubt to be untrue; but whether the evidence shows beyond a reasonable doubt that the defendant as a witness before the grand jury was not making a good faith attempt to answer the questions propounded to him. And if so, of course, whether such conduct obstructed the functioning of the grand jury and, so, the administration of justice.

There is no doubt at all in my mind that the defendant did not make any good faith attempt to answer these questions. He was playing "cat and mouse" so to speak, with the questioner. On the face of it there was no bona fide effort to perform as a witness. He feigned certain answers and he pretended others. And on the whole I would say without any question of a doubt he trifled with the grand jury.

* * * * *

As I view it the obstruction here is greater than if the witness had just said, "I refuse to tell you

anything about it"—not claiming the privilege. * * * So he was under a full obligation to tell the truth, the whole truth and nothing but the truth in making responses to the questions.

He certainly would have saved the time of the grand jury and would have obstructed justice much less if he would have said, "I won't answer any of that. I won't tell you anything." Then the grand jury would have at least known where they stood.
* * *

It is thus clear that, entirely apart from any perjury on his part, appellant was charged and was found guilty of giving obstructive and evasive answers to the Grand Jury which did in fact obstruct the administration of justice. In this light the findings of the District Court are abundantly sustained by the testimony.

Conclusion.

It is respectfully submitted that the judgment of the District Court should be affirmed.

LAUGHLIN E. WATERS,
United States Attorney,
PHILIP T. WHITE, *Attorney,*
Department of Justice,
Attorneys for Appellee.



APPENDIX A.

THE BURGLARY STORY

April 16, 1958

Page 195: Q. Now, you are now confined in the penitentiary after you entered a plea of guilty to the murder of Cecil Thomas?

A. That is correct.

Page 201: Q. How many times were you in his home?

A. Once.

Q. When was that once?

A. That's when I shot him.

Q. What?

A. That's when I shot him.

Q. All right. What did you go there for?

A. At that time?

Q. Yes.

A. To commit a burglary.

Q. Now, what time did you get there?

A. 8:30 or quarter to 9:00 or maybe later.

Q. All right. Then, go on and tell the Grand Jury the story.

A. Well, there was no one there. I knocked on the door pretty loud. If there had been anyone there, he would have come to the door. So at that point I went by on the side of the house, took the back screen off and went in, and I was going, you know,

Page 202:

looking around to see what I was going to take, and at that point I heard someone coming in the front door, so at that time I took a hiding place in the kitchen of his home, and at that point I was watching him as he came in, and he came in and he went to his room, or either the rest room. I remember hearing him cut a light on, and when he came back, he was coming back towards the kitchen, and at that time I stepped out, and I told him not to move, and he asked me "what was this," and at that point I was backing up, and he jumped at me, and when he jumped at me, I shot him, and I left the house running.

ADDITIONAL ON THE BURGLARY STORY

July 14, 1958

Page 1686:

Page 1687:

Q. Now, the first time you came before the Grand Jury, Bobby, you told a story about killing Hardrock in the course of a burglary; do you remember that?

A. Yes I do.

Q. Why did you tell the Grand Jury that you killed Cecil Thomas in the course of a burglary?

A. Why did I tell the Grand Jury that? Well, that is what I have been found guilty of and tried for.

Q. You were sworn when you appeared before the Grand Jury to tell the truth, weren't you?

A. Yes, I was.

- Page 1687: Q. Before you were brought before the Grand Jury the first time, you were in my office with Mr. Schauer and Mr. Warner and Mr. Smith, and at that time you told us about Cecil Thomas calling you on the telephone and telling you to come to his house, and you brought your pistol along, and the story about the three men. Now, when you got into the Grand Jury room here, you went back to the story of the burglary. Why did you do that?
- A. Well, as far as I am concerned, that is the true story. That is what I was tried and convicted of.
- Q. As far as you were concerned what?
- A. That is the true story; that is what I was tried and convicted of, murder and burglary.
- Q. You mean that is what really happened?
- Page 1688: A. No, that is not what I said. I have told you what really happened.
- Page 1689: Q. Now, which of these stories that you told the Grand Jury are the true stories, Bobby?
- Page 1690: A. The one you just got through reading to them.
- Q. The one about the three men in the car?
- A. That's right.

THE STORY ABOUT THE LOAN OF \$250

April 16, 1958

Page 206:

Q. Didn't you tell the Treasury Agents that Big Jay pointed out the house to you and told you there was a lot of loot there?

A. Yes, I also told him it was a burglary.

Q. What is that?

A. I also told him it was a burglary, that I went there to burglarize his home.

Q. That was not the truth?

A. No.

Q. Now you say you told the Treasury Agents that you went there to burglarize Cecil Thomas' house but that wasn't true?

A. That's correct.

Q. What did you go there for?

A. I had gave Cecil Thomas some money earlier that week and he had been putting me off about it so I just went over there that night and I told him, I said, well, you got to have some money or some stuff and he said at that time that my money was tied up and that he didn't have any stuff and then I repeated again, I said well you have got to have some money or some stuff and he said wait just a minute, I have got some and at that time he went back in his bedroom and when he came back he had a 30-30 rifle and at that point he

was telling me to leave the house and he didn't know when he was going to give me any stuff or when he would have any money for me.

Page 207:

Q. Don't you know that when Cecil Thomas was found dead on the floor that he had a clothes brush in one hand and some trousers and a hanger—

A. Yes.

Q. —on top of him?

A. Yes. That's what the officers told me.

Q. Well, how was he holding a rifle with a brush in one hand and the trousers and hanger on him if he had been carrying it?

A. I really don't know. From the understanding I got someone else was there after.

Page 207:

Q. Look at this photograph number 049833.

A. Yes.

Q. Is that the way he was lying when you left him?

A. Well, not on his back, no.

Q. What?

A. Not on his back, no.

Q. You mean he didn't have that brush in his hand?

A. No he didn't.

Page 208:

Q. You notice a pair of dark pants laying on top of him as he was lying there?

A. Yes.

- Q. He didn't have those?
- A. He didn't have no pants at all because he fell forward.
- Page 210: Q. Why didn't you tell the police what you just told the Grand Jury?
- A. Well, I was afraid to bring narcotics into it.
- Q. You thought narcotics was more serious than murder?
- A. Than burglary?
- Q. Than burglary?
- A. Yes.
- Page 212: Q. Now, tell the Grand Jury, did you think handling narcotics would be more severe on you than if you committed murder?
- A. No I didn't think it would be more severe.
- Page 215: Q. Are you sure that it was Hardrock you gave that \$250.00 to?
- A. Yes.
- Q. Then all you did that evening was to go down to the house to get from him the \$250.00?
- A. Yes.
- Q. Then this story about taking the screen off the side of the window to get in wasn't true, was it?
- A. Yes, it wasn't true.
- Page 217: Q. All right. Will you tell the Grand Jury now why you told the Police Dept. that it was in the course of a burglary that you killed Cecil Thomas rather than a fight over narcotics?

- A. Well, in the County Jail I had talked to one or two of the fellows and they more or less advised me not to mention narcotics. They said it would be more severe than burglary.

THE THREE MEN STORY

April 16, 1958

Page 203:

Q. And what did you tell us he called you about?

A. Well, he more or less wanted protection.

Page 204:

Q. What did he say to you on the telephone, what did you tell us?

A. Well, he said if I—he ask me would I like to make some money, and I told him yes, and he said well, could you come over to my house right away, and I said yes, I would, as soon as the bus could get me there, and when I got there, he asked would I like to make a half a piece of stuff, and I told him yes.

* * * * *

A. And at that time I asked him what would I have to do, and he said well, all you have to do is stay here with me tonight, and I told him all right, and at that point he asked me did I hear that, and I said hear what, and he said it sounded like someone was walking, and I said walking where, and he said more or less to the back, and he asked me to take a look, and at that time I did.

Q. Then what happened?

A. At that time I don't know exactly who it was, but someone twisted my neck and one said, "Frisk him" and they did and they found a gun. The other one took me to the car and after that I heard two shots, and then one came running from the house and got in the car and drove off.

Page 229:

Q. Which story is true now?

A. The one that I told you in the office this morning.

Q. All right now take your time and go on and start from the beginning?

A. * * * Well, like I say, Hardrock called me and told me that he asked me would I like to make some money. I told him yes. Then he told me how soon would I be able to make it to his house and I told him as soon as the bus would get me there. I think I got there, about oh 8:30 or 9:00 o'clock, I disremember. Anyway we was standing in the living room talking and he asked me did I hear that. And I told him no, I didn't hear nothing. He said that it sounds like somebody that is walking outside. And he asked me to take a look, and at that time I did.

Page 230:

A. And as I stepped out the back door someone pushed my head to one side and put a revolver in the back of my neck and told me "Don't move, buddy boy." And at that time they frisk

me and got the 38 revolver, one of them took me to the car, and I'm not sure but I think the other one went in the house. Anyway, about two minutes later I heard two shots and then one came running back and they got in the car and drove off. They dropped me off on the other side of Washington, somewhere, I don't remember exactly where it was, and *they gave me a thousand dollars* and told me to keep my mouth shut or something would happen to my kids. A—and at that time the heavy one on the right told me—told the other one, "Say, he know how to play his cards," or something like that and he gave me the gun and opened the door and I got out.

Page 231:

* * * * *

Q. What did the heavy set one look like?

A. Well he was—I didn't get a chance to see exactly what he looked like. The only thing I saw was his hands.

Q. Was he white or colored?

Page 232:

A. He was white.

Q. Was the other man with him white?

A. The two in the back were, the one in front I didn't see.

* * * * *

Q. How come you didn't see him.

A. Well, they had—I was wearing a cap and they had the bill pulled down to here.

Page 240:

Q. Now couldn't you tell as you were getting in the car whether the driver was a white man or colored man?

A. The driver, no, the driver wasn't sitting in the car.

Q. He was not sitting in the car?

A. No. Just the one in the back.

Q. All right. Was that the heavy one or the slim one?

A. That was both of them. The heavy and the slim.

A. —and a few minutes later I heard the shots and this other one came running out.

Q. The what?

A. This third party he came running out.

Q. Where did he get?

A. He got in the front seat.

Page 244:

Q. Which one gave you the thousand dollars?

A. The one on the right.

* * * * *

Page 245:

Q. Where did he get the thousand dollars?

A. From his pocket.

* * * * *

Q. Out of the side coat pocket?

A. Yes.

Q. Jacket pocket?

A. No it wasn't a jacket it was a suit. (Collins could see that it wasn't a jacket.)

Q. A what?

A. A suit.

Q. The jacket from the suit. We call this a jacket.

A. Oh, you do. I usually call them a dress coat.

Q. He took it out of his dress coat?

A. Yes.

Q. Was it rolled up or flat?

A. It was rolled up.

* * * * *

Q. And he handed you the money?

A. Yes.

Page 246:

Q. With his left hand?

A. Yes.

Q. Told you it was a thousand dollars.

A. Yes.

* * * * *

Q. What did he say he was giving you the thousand dollars for?

A. To keep my mouth shut.

Q. Now will you tell the Grand Jury just what happened from the time you got in the car, what happened and what was said by each and all of them, will you do that? It will be very helpful if you can remember it.

A. I know we drove around the block and come out on Washington, (They drove down three or four blocks and they make a left off of Washington,) and no one said anything until we got on a side street, and at that time, I think it was the one in the front, he made a statement, asked me if I didn't have two kids and I told him

Page 247:

yes, (and he asked me did I love my kids, you know, and I told him yes) and he said well, that was nice to know. By that time the car had stopped and this heavy one told me here is a thousand dollars, to keep your mouth shut and if you—If you talk or say anything something would happen to your family, and the other one said well, he knows how to play his cards. That was the conversation. He threw the gun at my stomach and opened the door and let me out.

May 23, 1958

Page 1239:

A. He walked back as far as the bar, and at that time I stepped out the back door and somebody pushed my head and put a cold piece of something here. I guess it was a revolver; and told me not to move and they frisked me and took the gun that I had off me, and the other one took me to the car; and as I got in the car he pulled the hat down to here. About two or three minutes later I heard a shot and I heard someone running from the back end of the house, and got in the car and drove off.

It was somewhere on the other side of Washington; I don't know exactly what the name of the street was, that I was given \$500 and told to keep my mouth shut and get

out of town. And the other one said; "Well, Bobby knows how to play his cards, and he has got two beautiful kids. Isn't that right, Bobby?" and I said "That sure is right," and at that time I was handed a gun and the door slammed and the car drove off.

Page 1244:

Q. Now, about the men in the car, who were the men in the car Bobby?

A. I don't know them, Mr. Goldschein.

Q. Describe them.

A. I couldn't even describe them to you, because I didn't see them.

Q. Well, you saw them before they pulled the hat over your eyes; they didn't do that until they got in the front of the car, I believe you told us.

A. No, I told you that when I came out of the house that one of them turned my head to the side and the other one frisked me and that one marched me to the car and the other one went in the house; and as I got in the car, my hat was pulled down over my eyes so that I couldn't see.

Page 1245:

July 14, 1958

Page 1687:

Q. Before you were brought before the Grand Jury the first time, you were in my office with Mr. Schauer, Mr. Warner and Mr. Smith, and at that time you told us about Cecil Thomas calling you on the telephone and telling you to come to his house, and you

brought your pistol along, and the story about the three men. Now, when you got into the Grand Jury room here, you went back to the original story of the burglary. Why did you do that?

A. Well, as far as I am concerned that is the true story. That is what I was tried and convicted of.

* * * * *

Page 1688: Q. * * * What do you mean by that was a true story—you mean the one about the burglary was the true story?

A. Well, what do you want me to mean?

Page 1689: Q. * * * Now, which of these stories that you told the Grand Jury are the true stories, Bobby?

Page 1690: A. The one you just got through reading to them.

Q. The one about the three men in the car?

A. That's right.

* * * * *

Q. Now you told the Grand Jury that they gave you \$1,000.

A. Yes.

Q. Do you remember that?

A. I remember making that statement.

Q. Was that true?

A. It was either \$1,000 or \$500, I don't exactly remember.

Page 1691: Q. You don't remember whether it is \$1,000 or \$500?

A. No, I don't.

Q. Now, why is it that you can't remember that which it was? Are you in the habit of having as much as five hundred and a thousand dollars on you from time to time?

A. No, I am not.

Q. Did you ever have as much as \$500 at any one time before?

A. No, I haven't.

* * * * *

Q. You don't remember ever having a \$1,000 dollars at one time?

A. I don't remember whether it was a thousand or \$500.

Page 1692:

Q. —what I am trying to get at is, Bobby, how come you can forget whether it was five hundred or a thousand, if you never had that much money before?

A. I don't know; it was either five hundred or a thousand dollars; I don't remember exactly which one.

July 25, 1958

Page 2650:

A. —I got up and stepped through the back door, and somebody turned me around and put a gun, I guess in my neck and asked me not to move, somebody searched me, and I was put in a car and taken somewhere and given some money and told to leave town.

Page 2604:

Q. Now, did they walk alongside of you as you walked out the driveway?

A. Yes, one had me by the arm.

Q. Which arm?

A. The left I think.

* * * * *

Q. And the other one was on the other side of you or what?

A. I don't remember exactly how many took us to the car.

* * * * *

Q. You don't know whether this was one or two?

A. No, I don't.

* * * * *

Page 2611: Q. Who do you mean by the one on the inside?

A. Well, there was someone on the inside of the car, who, I don't know.

Q. One on the back seat?

A. Yes.

Page 2612: Q. All right, when you got in the car, where did you sit?

A. I was sitting in the middle.

* * * * *

Q. All right, after you got in, the man that was with you did what, did he go back to the house?

A. No, he didn't.

Q. He got in the car with you?

Page 2613: A. Yes.

Q. And then what happened?

A. A few minutes later I heard two shots and someone hurrying away, got in the car and drove off.

* * * * *

Page 2615: Q. Where did he get in?

A. Got in the front seat.

Q. Next to the driver?

A. He got in the front seat, evidently he must have been the driver.

Page 2628:

Q. But they knew you had two children?

A. Evidently; they mentioned it.

Q. Which one mentioned it?

A. The one on my left.

LENGTH OF TIME APPELLANT
HAD KNOWN THOMAS

April 16, 1958

Page 195:

Q. How long have you known—did you know Cecil Thomas?

A. Over a period of about three or four months.

Page 222:

Q. There is no question in your mind but that that is Hardrock, is there?

A. No there isn't.

Q. You knew him well?

A. Well, I told you I only knew him about four or five months.

May 23, 1958

Page 1243:

Q. Now, how long had you known Cecil Thomas before the day of the murder?

A. Well, I would say about three or four years at most.

July 25, 1958

Page 2551:

Q. * * * Now, will you tell the Grand Jury how long before October 28, 1957, you met Cecil Thomas, approximately?

A. I don't exactly remember.

Q. Give us your best recollection?

A. I couldn't do that because I don't remember

* * * * *

Page 2552: A. I had been knowing him approximately four years.

HOW APPELLANT CAME TO KNOW THOMAS

April 16, 1958

Page 196: Q. Did you meet him (Hardrock) by arrangement here?

A. No, I met him through a friend . . .

* * * * *

A. Well, they call him Big Jay. That's all I know him by.

July 14, 1958

Page 1697: Q. Who was it introduced you to Hardrock?

A. I don't remember, Mr. Goldschein.

Q. Do you remember telling the Grand Jury if it was Big J?

A. I don't remember making that statement; I could have made it; I don't know.

Q. What?

A. I don't know. I could have made it.

Q. Well, if you made it, was it true, or was it one of those yarns you were telling the Grand Jury?

A. I got introduced to him—by who I don't remember.

Q. If you told the Grand Jury it was Big J?

A. It was Big J.

Q. —Were you telling the truth then?

A. Yes.

NUMBER OF TIMES APPELLANT WAS IN
THOMAS' HOUSE

April 16, 1958

- Page 201: Q. How many times were you in Cecil Thomas' home?
A. Once.
Q. When was that once?
A. That's when I shot him.

July 25, 1958

- Page 2552: Q. Did you ever go to his house before?
A. I think once before I am not sure.
Q. You say once, or twice?
A. Once before, yes.

* * * * *

- Q. Was it the same place?
A. Yes, it was the same place.
Page 2555: Q. That was the same place where you were on October 28, 1957?
A. Yes, it was.

APPELLANT'S USE OF NARCOTICS

April 16, 1958

- Page 223: Q. Did you use heroin?
A. Yes.
Page 224: Q. How big a habit did you have?
A. Oh, I would say about two spoons a day.
Page 225: Q. One or two. What do two spoons a day cost you?
A. Well \$40 to \$50.
Q. Forty or \$50 a day?
A. Yes.

- Page 231: Q. What did you do with the thousand dollars? (That he got from the men).
* * * * *
- A. I mostly bought narcotics and a few clothes.

July 14, 1958

- Page 1698: Q. How big a habit did you have?
A. Well a spoon would last me a month.

July 25, 1958

- Page 2641: Q. And that you were addicted to heroin?
A. No, I made no statement like that.
* * * * *

- Page 2642: Q. You didn't make a statement that you had a habit of 20, \$40 a day?
A. No, I think you made that statement, didn't you?
Q. I made the statement?
A. Yes.
Q. Where did I get that—
A. You said I told you that, but I said I would get a spoon of heroin that would cost me \$25.00; that would last me quite sometime.

APPELLANT'S KNOWLEDGE OF QUANTITIES OF HEROIN

April 16, 1958

- Page 204: Q. What do you mean by a half a piece of stuff?
A. A half a piece of heroin.
Q. That's how much?
A. A half of a piece.
Q. What is a piece?
A. A piece is a large quantity.

- Q. An ounce?
A. It is, more or less, yes.
- Page 225: Q. Half a piece. That is about half an ounce?
A. Yes, something like that.
Q. How many spoons in an ounce?
A. The exact amount of spoons in an ounce, that is hard to tell. It all depends on how much they cut it and you know—.
- Page 226: Q. How much did you pay for a spoon?
A. A spoon? \$20.00.

July 14, 1958

- Page 1694: Q. How much is a half a piece of stuff Bobby?
A. I don't know. I never measured it.
Q. I don't care whether you measured it, give us an idea of what it is.
A. I couldn't do that, I am not that familiar with narcotics.
- Page 1695: Q. How much did you buy from Alexander at one time?
A. Oh, I have gotten—six or seven spoons from him.
- * * * * *
- Page 1696: Q. Six or seven spoons, how many spoons in a half a piece about.
A. I couldn't tell you off hand, Mr. Goldschein.

* * * * *

APPELLANT'S PURCHASES OF HEROIN

April 16, 1958

- Page 223: Q. Did you ever get any narcotics from Big J?
A. No.
- Page 231: Q. What did you do with the thousand dollars?
A. I spent it.
Q. Do you remember what you did with it?
A. I mostly bought narcotics and a few clothes.

May 23, 1958

- Page 1239: Q. Who did you buy heroin from Bobby?
A. Well there were several people
* * * * *
- Page 1240: There was Walter Alexander—there was his woman, I imagine Shirley. There was also Big Jay.
- Page 1242: Q. Now who else did you buy heroin from?
A. Well there was Big J, Walter and I also got heroin from Marie.
- Page 1245: Q. Did you ever buy any heroin from Don Newton?
A. Yes, I have.
- Page 1246: Q. How many times did you buy heroin from Don Newton?
A. Well, several times.
* * * * *
- Q. About when was the last time?
A. I said it was quite some time ago.

Q. How long before the killing, Bobby, of Hardrock?

A. I would say about 60—from 30 to 60 days, somewhere about there.

July 14, 1958

Page 1678:

Q. How much heroin did you buy from Don Newton?

A. I don't recall.

Page 1683:

Q. How long has Newton been a go-between, as you call it, for you?

A. Oh, I got narcotics from him twice.

* * * * *

Q. When was the last time you got heroin from him?

A. I don't remember, it has been quite some time Mr. Goldschein.

Page 1686:

Q. Now, will you tell us how much heroin you got from Don Newton?

A. I don't remember.

Page 1693:

Q. Did you ever buy any heroin from Hardrock?

A. I don't remember.

July 25, 1958

Page 2643:

Q. We are satisfied that you could have; Shirley O'Dell was Walter Alexander's girl friend, wasn't she?

A. Yes, she was.

Q. Now, my question is, did you ever buy any from her?

A. Yes, I did.

APPELLANT'S DESCRIPTION OF CAR

April 16, 1958

Page 239:

Q. Now, when this man that had the gun to the back of your head, took you out to the car in front of Cecil Thomas' house on the night of the killing, what kind of a car was it?

A. It was a Ford.

Q. A new Ford?

A. Well, it wasn't new. It was about a '56 or '57, something like that.

July 25, 1958

Page 2609:

Q. Now when you got to that car what kind of a car did you see there?

A. I don't know exactly what kind of a car it was.

Q. Was it a big car?

Page 2610:

A. I don't remember if it was a large car or not; it was a car.

Q. Well, you know whether it was a large car or a small that you got into?

A. It was a medium car, just a car, that is all I know.

Q. Was it a four door car?

A. Yes, it was.

APPENDIX B

Exhibits

<u>No.</u>	<u>Identified</u>	<u>Received</u>
1	24	24
2	42	51
3	42	52
4	52	169
5	52	169
6	52	169
7	52	169
8	108	109
9	111	121 (withdrawn)
10	111	121 (withdrawn)
11	134	

No. 16385 ✓

United States
Court of Appeals
for the Ninth Circuit

ELSINORE C. MACHRIS GILLILAND, also
known as Elsinore Machris Gilliland,
Appellant,

vs.

FAYE LYONS, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

JUN 18 1959

PAUL P. O'BRIEN, CLERK

No. 16385

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WM. L. MURPHEY,
JOHN B. ANSON,

835 Rowan Building,
Los Angeles 13, California.

For Appellee:

WELBURN MAYOCK,
524 South Spring Street,
Los Angeles 13, California,

MORRIS LAVINE,
619 Bartlett Building,
Los Angeles, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.

United States District Court, Southern District
of California, Central Division

No. 20301 PH

FAYE LYONS,

Plaintiff,

vs.

ELSINORE C. MACHRIS GILLILAND, also
known as ELSINORE MACHRIS GILLI-
LAND, Defendant.

COMPLAINT

(Libel—Invasion of Privacy—Slander)

Comes now the plaintiff and for her cause of ac-
tion alleges the following:

I.

Jurisdiction exists in the above entitled Court by reason that plaintiff is a citizen of the State of Florida, County of Dade, and defendant is a citizen of the State of California, County of Riverside. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

II.

That the defendant, on or about the 1st day of October, 1955, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the

plaintiff the false and malicious words following, to-wit:

“That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his [2] residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilliland and said Faye Lyons were registered by him as “Ray Gilliland and Family.”

III.

That the defendant meant by the foregoing false and malicious words that the plaintiff was unchaste; that she lived in concubinage and was guilty of a felony under, and by virtue of, the laws of the State of Arizona by reason that the plaintiff had been guilty of the crime of adultery.

IV.

That by means of the publishing of said false and malicious words, the plaintiff is greatly injured in her name and reputation and has been rendered liable to prosecution for adultery to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

V.

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton disregard of the rights and feelings of plaintiff, and

by reason thereof, plaintiff demands exemplary and and punitive damages against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

For a Second Cause of Action

Comes now the plaintiff and complains and alleges as follows for her second cause of action herein.

I.

Incorporates herein by reference as completely as though set forth herein in full, Paragraph I of her first cause of action herein. [3]

II.

That, on or about the 26th day of November, 1955, at the City of Los Angeles, County of Los Angeles, State of California, the defendant Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, well knowing the premises, in a certain discourse in the presence and hearing of diverse persons, maliciously spoke, wrote and verified and published of and concerning the plaintiff the false and malicious words following, to-wit:

“That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilli-

land and said Faye Lyons were registered by him as 'Ray Gilliland and Family.'"

That said writing was incorporated in a cross complaint for divorce entitled George Chester Ray Gilliland, also known as G. Ray Gilliland, also known as Ray Gilliland, Plaintiff, vs. Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, First Doe to Sixth Doe, inclusive, Defendants; Elsinore Machris Gilliland, also known as Elsinore C. Machris Gilliland, Cross-Complainant, vs. George Chester Ray Gilliland, also known as G. Ray Gilliland, also known as Ray Gilliland, Cross-Defendant, and Faye Lyons and Ann Meyers, Jane Doe and Mary Roe, Co-Respondents, which has been filed in the Superior Court of the State of California in and for the County of Riverside, No. 62839. That said complaint was verified by the Cross-Complainant, Elsinore Machris Gilliland on the 26th day of November, 1955, in the State of California, County of Los Angeles. [4]

III.

That the defendant meant by the foregoing false and malicious words that the plaintiff was unchaste; that she lived in concubinage and was guilty of a felony under, and by virtue of, the laws of the State of Arizona by reason that the plaintiff had been guilty of the crime of adultery.

IV.

That by means of the publishing of said false and malicious words, the plaintiff is greatly injured

in her name and reputation and has been rendered liable to prosecution for adultery to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

V.

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton disregard of the rights and feelings of plaintiff, and by reason thereof, plaintiff demands exemplary and punitive damage against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

For a Third Cause of Action

Comes now the plaintiff and complains and alleges as follows for her third cause of action herein.

I.

Incorporates herein by reference as completely as though set forth herein in full, Paragraphs I, II and III of her first cause of action and Paragraphs I, II and III of her second cause of action.

II.

That said allegations were published in a newspaper of general circulation, as well as spoken and plead by the defendant. That defendant was never served in said divorce proceeding nor given an opportunity to defend her good name in the matter. [5] That said publication has caused plaintiff great mental pain, humiliation and mortification and has

tended to expose her to public contempt, ridicule, aversion and disgrace, and has caused an evil opinion of her in the minds of her acquaintances and the public generally, all to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

III.

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton disregard of the rights and feelings of the plaintiff and by reason thereof, plaintiff demands exemplary and punitive damage against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

Wherefore, plaintiff prays judgment against the defendant for the sum of Five Hundred Thousand Dollars (\$500,000.00) as compensatory damage, and for the sum of Five Hundred Thousand Dollars (\$500,000.00) as exemplary and punitive damages, for costs of suit, and for such other and further relief as to the Court may deem just and equitable in the premises.

/s/ FAYE LYONS. [6]

Duly Verified.

[Endorsed]: Filed August 9, 1956.

[Title of District Court and Cause.]

AMENDED COMPLAINT

(Libel—Invasion of Privacy—Slander)

Comes now the plaintiff and for her cause of action alleges the following:

I.

Jurisdiction exists in the above entitled Court by reason that plaintiff is a citizen of the State of Florida, County of Dade, and defendant is a citizen of the State of California, County of Riverside. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

II.

That the defendant, on or about the 29th day of March, 1955, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to-wit: "Ray is shacking up with Faye Lyons." That the defendant, on or about the 10th day of August, 1955, at Palm Springs, California, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and [8] published of the plaintiff the false and malicious words following, to-wit: "Ray is shacking up with Faye Lyons." That the defendant, on or about the 26th day of November, 1955, at

Los Angeles, California, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to-wit: "That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilliland and said Faye Lyons were registered by him as "Ray Gilliland and Family." That the defendant, on or about the 21st day of December, 1955, at Riverside, California, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to-wit: "Ray is being punished for sleeping with Faye Lyons." That the defendant, on or about the 14th day of February, 1956, at Scottsdale, Arizona, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to-wit: "Ray shackled up with Faye Lyons." That the defendant, on or about the 15th day of May, 1956, at Scottsdale, Arizona, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious

words following, to-wit: "Ray shackled up with Faye Lyons." That the defendant, on or about the 26th day of March, 1956, at Phoenix, Arizona, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to-wit: "Ray shackled up with Faye Lyons." [9]

III.

That the defendant meant by the foregoing false and malicious words that the plaintiff was unchaste; that she lived in concubinage and was guilty of a felony under, and by virtue of, the laws of the State of Arizona by reason that the plaintiff had been guilty of the crime of adultery.

IV.

That by means of the publishing of said false and malicious words, the plaintiff has been caused great mental pain, distress, humiliation, and mortification, and has been exposed to public contempt, ridicule, aversion and disgrace and has caused an evil opinion of her in the minds of her acquaintances and the public generally, the plaintiff is greatly injured in her name and reputation and has been rendered liable to prosecution for adultery, all to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

V.

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton

disregard of the rights and feelings of plaintiff, and by reason thereof, plaintiff demands exemplary and punitive damage against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

For a Second Cause of Action

Comes now the plaintiff and complains and alleges as follows for her second cause of action herein.

I.

Incorporates herein by reference as completely as though set forth herein in full, Paragraphs I, II, III, IV and V of her first cause of action [10] herein.

II.

That, on or about the 26th day of November, 1955, at the City of Los Angeles, County of Los Angeles, State of California, the defendant Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, well knowing the premises, in a certain discourse in the presence and hearing of diverse persons, maliciously spoke, wrote and verified and published of and concerning the plaintiff the false and malicious words following, to-wit: "That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did

commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilliland and said Faye Lyons were registered by him as "Ray Gilliland and Family." That plaintiff herein was never served in said divorce proceeding nor did defendant endeavor to serve said plaintiff nor was plaintiff given an opportunity to defend her good name in the matter nor assuage her feelings by being given the opportunity to defend as required by the Statutes of the State of California.

III.

That the defendant meant by the foregoing false and malicious words that the plaintiff was unchaste; that she lived in concubinage and was guilty of a felony under, and by virtue of, the laws of the State of Arizona by reason that the plaintiff had been guilty of the crime of adultery.

IV.

That by means of the publishing of said false and malicious words, the plaintiff has been caused great mental pain, distress, humiliation, and mortification, and has been exposed to public contempt, ridicule, aversion and disgrace and has caused an evil opinion of her in the minds of her acquaintances and the [11] public generally, the plaintiff is greatly injured in her name and reputation and has been rendered liable to prosecution for adultery, all to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

V.

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton disregard of the rights and feelings of plaintiff, and by reason thereof, plaintiff demands exemplary and punitive damage against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

For A Third Cause of Action

Comes Now the plaintiff and complains and alleges as follows for her third cause of action herein.

I.

Incorporates herein by reference as completely as though set forth herein full, Paragraphs I, II, III, IV and V of her first cause of action and Paragraphs I, II, III, IV and V of her second cause of action.

II.

That defendant, Elsinore C. Machris Gilliland, sought newspaper publicity, gave interviews to the press, endeavored to have her story written in the magazine known as Confidential for, as she often said, "Her public must be informed." That by reason of her endeavors, there was published in a newspaper of general circulation on or about March 23, 1956, as well as spoken and plead by the defendant, the following, to-wit:

"In her counter complaint for divorce, Mrs. Gilliland accuses her husband of having affairs with two

socially prominent women at Lake Tahoe and other affairs in May, June and July of 1955 with two other women at his residence at 4717 N. 71st Pl., Scottsdale, Arizona, a suburb of Phoenix. [12]

Named as co-respondents in the counter complaint were "Ann (Peggy) Meyers" and "Faye Lyons."

In an affidavit, Mrs. Gilliland stated she had an annual income of \$267,000 in 1954 and requires at least \$10,000 a month subsistence."

III.

That the defendant meant by the foregoing false and malicious words that the plaintiff was unchaste; that she lived in concubinage and was guilty of a felony under, and by virtue of, the laws of the State of Arizona by reason that the plaintiff had been guilty of the crime of adultery.

IV.

That by means of the publishing of said false and malicious words, the plaintiff has been caused great mental pain, distress, humiliation, and mortification, and has been exposed to public contempt, ridicule, aversion and disgrace and has caused an evil opinion of her in the minds of her acquaintances and the public generally, the plaintiff is greatly injured in her name and reputation and has been rendered liable to prosecution for adultery, all to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

V.

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton disregard of the rights and feelings of plaintiff, and by reason thereof, plaintiff demands exemplary and punitive damage against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

Wherefore, plaintiff prays judgment against the defendant for the sum of Five Hundred Thousand Dollars (\$500,000.00), as compensatory damage, and for the sum of Five Hundred Thousand Dollars (\$500,000.00) as exemplary and punitive damages, for costs of suit, and for such other and further relief as to the Court may [13] deem just and equitable in the premises.

/s/ COIT I. HUGHES,
Attorney for Plaintiff. [14]

Affidavit of Service by Mail Attached. [15]

[Endorsed]: Filed November 20, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE FROM
AMENDED COMPLAINT; AND POINTS
AND AUTHORITIES

To Coit I. Hughes, Esq., 208 West 8th Street, Los
Angeles, California, Attorney for Plaintiff:
Please Take Notice that the undersigned will

move this Court at Courtroom No. 1, United States Courts and Post Office Building, City of Los Angeles, State of California, on the 10th day of December, 1956, at 10:00 o'clock A.M. of said day, or as soon thereafter as counsel can be heard, to strike from the Amended Complaint the hereinafter described allegations, on the ground that said allegations are redundant and immaterial under Rule 12 (f) Federal Rules of Civil Procedure.

Specification 1. To strike from Paragraph II of the First Cause of Action the following allegation on page 1, lines 25-29:

"That the defendant, on or about the 29th day of March, 1955, in a certain discourse which the defendant had in the [16] presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to-wit: 'Ray is shacking up with Faye Lyons.' "

The ground for said motion on Specification 1 is that the alleged defamatory statement is immaterial in that the claim based thereon did not accrue within one year before the commencement of this action, and is therefore barred by the provisions of Section 340 subd. (3) of the California Code of Civil Procedure, and Section 12-541 subd. (1) of Arizona Revised Statutes Annotated.

That it would be unduly burdensome on defendant to investigate said alleged occurrence and prepare a defense thereto when no relief would be granted on said alleged defamatory statement, since

any such relief is barred by any applicable statute of limitations.

Specification 2. To strike from Paragraph II of the Third Cause of Action the following allegation on page 6, lines 3-5:

“In an affidavit, Mrs. Gilliland stated that she had an annual income of \$267,000 in 1954 and requires at least \$10,000 a month subsistence.”

The ground for said motion on Specification 2 is that the alleged statement is not, as a matter of law, libelous, is completely immaterial and if not stricken might be prejudicial to defendant.

This motion is based on all the pleadings and papers on file in the above entitled action, answers to the written interrogatories requested by defendant under Rule 33 of Federal Rules of Civil Procedure, and the points and authorities attached hereto.

Dated: November 30, 1956.

WM. L. MURPHEY and
JOHN B. ANSON,

/s/ By JOHN B. ANSON,
Attorneys for Defendant. [17]

Memorandum of Points and Authorities

I.

Upon a motion made by a party within 20 days after the service of the pleading upon him, the court may order stricken from any pleading any redundant or immaterial matter.

Rule 12 (f) Federal Rules of Civil Procedure.

II.

Regarding Specification 1 hereof, it appears on the face of the complaint that the alleged defamatory statement is barred by the statute of limitations.

The defense of limitations can be raised by motion to dismiss.

Berry v. Chrysler Corp. (C.C.A. Mich., 1945) 150 F (2) 1002;

Stanley v. Bird (D.C. Ky. 1949) 85 F. Supp. 358;

Under Rule 9 (b) Federal Rules of Civil Procedure, for the purpose of testing the sufficiency of a pleading, averments of time are material, and where the complaint shows on its face that the action is barred by the statute of limitations, the defense can be raised on a motion to dismiss.

Gossard v. Gossard (C.C.A. Colo. 1945) 179 F (2d) 111.

However, in the instant case, the allegation sought to be stricken under Specification 1 constitutes only one out of seven alleged defamatory statements, constituting the First Cause of Action, and hence a motion to strike said allegations as redundant and immaterial under Rule 12 (f) seems more appropriate than a motion to dismiss under Rule 12 (b) (6).

III.

The allegations sought to be stricken under Specification 2 are completely irrelevant to the alleged

Third Cause of Action, and also immaterial, and have no bearing upon the controversy.

Such allegations are properly subject to a motion to [18] strike from the pleadings.

Salem Engineering Co. v. National Supply Co. (D.C.) Pa. 1948) 75 F. Supp. 993.

Respectfully submitted,

WM. L. MURPHEY and

JOHN B. ANSON,

/s/ By JOHN B. ANSON,

Attorneys for Defendant. [19]

Affidavit of Service by Mail Attached. [20]

[Endorsed]: Filed November 30, 1956.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Dec. 10, 1956. At: Los Angeles, Calif.

Present: Hon. Wm. C. Mathes, District Judge.

Calling Calendar of Hon. Peirson M. Hall, District Judge.

Deputy Clerk: S. W. Stacey. Reporter: Don P. Cram.

Counsel for Plaintiff: Coit I. Hughes.

Counsel for Defendant: John B. Anson.

Proceedings: For hearing on (1) motion of defendant to dismiss the amended complaint, and (2) motion of defendant to strike from the amended complaint.

Oral stipulation nunc pro tunc as of Nov. 20, 1956, re amended complaint is approved and Court Orders motion (1) denied, counsel for plaintiff to prepare formal order; and motion (2) granted, counsel for defendant to prepare formal order.

JOHN A. CHILDRESS,

Clerk,

/s/ By S. W. STACEY,

Deputy Clerk. [21]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

For answer to plaintiff's Amended Complaint, defendant admits, denies, and alleges as follows:

As To The First Cause of Action

I.

For answer to the allegations in Paragraph I of plaintiff's First Cause of Action, defendant admits that she is a citizen of the State of California, County of Riverside. Defendant alleges that she has no knowledge or information sufficient to form a belief as to the balance of the allegations in said Paragraph I, and basing her denial on said lack of information or belief, denies each and every other allegation contained in said Paragraph I.

II.

For answer to the allegations in Paragraphs II and III of the First Cause of Action, defendant de-

nies each and every [22] allegation, statement, and averment in said paragraphs contained.

III.

For answer to the allegations in Paragraph IV of the First Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that by reason of the matters alleged in plaintiff's First Cause of Action, or for any reason or at all, defendant was damaged in the sum of \$500,000.00, or in any other sum whatsoever or at all.

IV.

For answer to the allegations in Paragraph V of the First Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that she did the things alleged in the First Cause of Action or any of them, and specifically denies that plaintiff is entitled to exemplary and punitive damages in the sum of \$500,000.00 or in any sum whatsoever or at all.

V.

First Affirmative Defense to the First Cause of Action

Defendant is informed and believes and upon such information and belief alleges that each and all of the supposed defamatory words set forth in the First Cause of Action in plaintiff's Amended Complaint are true.

As to the Second Cause of Action

I.

For answer to the allegations in Paragraph I of plaintiff's Second Cause of Action, defendant re-adopts and reasserts the allegations and denials hereinabove set forth in Paragraphs I, II, III, and IV of her Answer to the First Cause of Action herein.

II.

For answer to the allegations in Paragraph II of plaintiff's Second Cause of Action, defendant admits and alleges that [23] on or about November 26, 1955, there was pending in the Superior Court of the State of California, in and for the County of Riverside, an action for divorce against defendant on a complaint for divorce filed on or about October 21, 1955, being action No. 62839 on the register of actions in the office of the Clerk of said court entitled: "George Chester Ray Gilliland, also known as G. Ray Gilliland, also known as Ray Gilliland, Plaintiff, vs. Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, First Doe to Sixth Doe inclusive, Defendants."

That defendant's attorneys prepared a cross-complaint for divorce in said divorce action No. 62839 on defendant's behalf in which plaintiff herein, Faye Lyons, and one Ann Meyers were named as Co-Respondents in the Second Cause of Action in said cross-complaint for divorce. That the Second Cause of Action in said cross-complaint for divorce in said divorce action No. 62839 contained the following allegation:

“That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him **over-**night, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as ‘Ray Gilliland and Family.’”

That on or about November 28, 1955, defendant verified said cross-complaint, and on or about November 28, 1955, said cross-complaint was filed in said divorce action No. 62839 by her attorneys.

Further answering the allegations of Paragraph II of the Second Cause of Action defendant admits that plaintiff herein was not served in said divorce action No. 62839. Defendant alleges [24] that defendant did endeavor to serve plaintiff herein in said divorce action No. 62839. Defendant is informed and believes and upon such information and belief alleges that defendant’s attorneys diligently endeavored to ascertain plaintiff’s address and place of residence, but were unable, after due diligence, to locate or ascertain the place of residence of plaintiff in order to serve her; defendant alleges that plaintiff has, since shortly after November 29, 1955, had full knowledge of the pendency of said Second Cause of Action of said cross-complaint in divorce action No. 62839, and has not made any appearance

therein, although plaintiff has had full and complete opportunity to do so.

Defendant alleges that the parties to said divorce action No. 62839, on or about June 12, 1956, entered into a property settlement agreement, mutually satisfactory to both parties, in which defendant's then husband, George Chester Gilliland, agreed to dismiss with prejudice his complaint for divorce and any affirmative relief sought in his answer to the cross-complaint filed in said action No. 62839; that the plaintiff in said action No. 62839 stipulated in writing that the first cause of action of said cross-complaint based upon extreme cruelty be heard as a default, and on June 13th, 1956, said divorce action was so tried on the issues of the first cause of action of the cross-complaint, and an interlocutory decree of divorce was granted to defendant herein and was entered on June 13, 1956, in Judgment Book 76 Page 630, of the Superior Court of the State of California, in and for the County of Riverside. Defendant alleges that said Second Cause of Action in said divorce action No. 62839 has not been dismissed and is still pending.

Defendant denies each and every other allegation in said Paragraph II of plaintiff's Second Cause of Action not hereinabove expressly admitted and alleged. [25]

III.

For answer to the allegations in Paragraph III of plaintiff's Second Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained.

IV.

For answer to the allegations in Paragraph IV of the Second Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that by reason of the matters alleged in plaintiff's Second Cause of Action, or for any reason or at all, defendant was damaged in the sum of \$500,000.00, or in any other sum whatsoever or at all.

V.

For answer to the allegations in Paragraph V of the Second Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that plaintiff is entitled to exemplary and punitive damages in the sum of \$500,000.00 or in any sum whatsoever or at all.

VI.

First Affirmative Defense to the Second
Cause of Action

That the substance of the supposed defamatory words set forth in the Second Cause of Action herein were incorporated as allegations in a cross-complaint for divorce filed in said action No. 62839 on the register of actions in the Superior Court of the State of California, in and for the County of Riverside, in exact words as follows:

“That, in May and June, 1955, the cross-defendant associated with, kept, and did commit

adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did [26] associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as 'Ray Gilliland and Family.' "

That said allegation is a privileged publication under the provisions of section 47 subd. 2 (3) of the Civil Code of the State of California, in the following facts which defendant hereby alleges:

1. That said cross-complaint for divorce was verified by defendant;

2. That the allegations of the supposed defamatory words in said cross-complaint for divorce were made by defendant in good faith and without malice;

3. That at the time the allegations of the supposed defamatory words in said cross-complaint for divorce were made, defendant had good and sufficient reason to believe and did honestly and reasonably believe that said allegations were true, and defendant had reasonable and probable cause for believing the truth of said allegations;

4. That the allegations of the supposed defamatory words in said cross-complaint for divorce were material and relevant to the issues in said action No. 62839;

5. That defendant did not in any other way publish the supposed defamatory words alleged in the Second Cause of Action of the Amended Complaint herein.

VII.

Third Affirmative Defense to the Second Cause of Action

That the Second Cause of Action fails to state a claim against the defendant upon which relief can be granted.

As to the Third Cause of Action

I.

For answer to the allegations of Paragraph II of [27] plaintiff's Third Cause of Action, defendant admits and alleges that on March 23, 1956, there was published in the Daily Enterprise, a newspaper of general circulation in Riverside, California, a news article describing a hearing on March 22, 1956, in the Superior Court of the State of California, in and for the County of Riverside, the hereinbefore described action No. 62839, and that said article contained, among other statements, substantially the words set forth in quotations in Paragraph II of plaintiff's Third Cause of Action herein.

Except as hereinabove expressly admitted and alleged, defendant denies each and every other allegation in said Paragraph II of plaintiff's Third Cause of Action, and specifically denies that defendant had anything at all to do with said newspaper publication, and specifically denies that said news-

paper publication was "by reason of her endeavors," in any manner whatsoever.

III.

For answer to the allegations in Paragraph III of plaintiff's Third Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained.

IV.

For answer to the allegations in Paragraph IV of the Third Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that by reason of the matters alleged in plaintiff's Third Cause of Action, or for any reason or at all, defendant was damaged in the sum of \$500,000.00, or in any other sum whatsoever or at all.

V.

For answer to the allegations in Paragraph V of the Third Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further [28] defendant specifically denies that she did the things alleged in the Third Cause of Action or any of them, and specifically denies that plaintiff is entitled to exemplary and punitive damages in the sum of \$500,000.00, or in any sum whatsoever or at all.

VI.

First Affirmative Defense to Third
Cause of Action

Defendant is informed and believes and upon such information and belief alleges that the supposed defamatory words set forth in plaintiff's Third Cause of Action are true.

VII.

Second Affirmative Defense to Third
Cause of Action

That the substance of the supposed defamatory words set forth in the Third Cause of Action were incorporated as allegations in the Second Cause of Action of a cross-complaint for divorce filed in said action No. 62839, on the register of actions in the Superior Court of the State of California, in and for the County of Riverside, in exact words as follows:

“That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as ‘Ray Gilliland and Family.’”

That said allegation is a privileged publication under the provisions of section 47 subd. 2 (3) of the Civil Code of the State of California, in the following facts which defendant hereby alleges:

1. That said cross-complaint for divorce was verified by defendant;

2. That the allegations of the supposed defamatory words [29] in said cross-complaint for divorce were made by defendant in good faith and without malice;

3. That at the time the allegations of the supposed defamatory words in said cross-complaint for divorce were made the defendant had good and sufficient reason to believe and did honestly and reasonably believe that said allegations were true, and defendant had reasonable and probable cause for believing the truth of said allegations;

4. That the allegations of the supposed defamatory words in said cross-complaint for divorce were material and relevant to the issues in said action No. 62839;

5. That defendant did not in any other way publish the said supposed defamatory words.

VIII.

Third Affirmative Defense to Third Cause of Action

That the Third Cause of Action fails to state a claim against the defendant upon which relief can be granted.

Wherefore, defendant prays that plaintiff take nothing by her action, and that defendant have judgment against plaintiff for her costs of suit, and for such other and further relief as to the court may seem just.

WM. L. MURPHEY and
JOHN B. ANSON,
/s/ By WM. L. MURPHEY,
Attorneys for Defendant. [30]

Duly Verified.

Affidavit of Service by Mail Attached. [31]

[Endorsed]: Filed December 28, 1956.

PLAINTIFF'S EXHIBIT No. 2

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE ORDER

Following pre-trial, proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, It Is Ordered:

I.

This is an action for damages for slander and libel.

A. Plaintiff's Complaint.

By the first cause of action of her complaint, Faye Lyons, as plaintiff, seeks to recover from Elsinore C. Machris Gilliland, also known as Elsinore Mach-

Plaintiff's Exhibit No. 2—(Continued)

ris Gilliland, as defendant, compensatory damages in the sum of \$500,000.00 and exemplary damages in the sum of \$500,000.00 for alleged oral defamations claimed to have been made by defendant concerning the plaintiff:

1. On August 10, 1955, at Palm Springs, California, to-wit: "Ray is shacking up with Faye Lyons". [32]

2. On November 26, 1955, at Los Angeles, California, to-wit: "That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilliland and said Faye Lyons were registered by him as 'Ray Gilliland and Family'."

3. On December 21, 1955, at Riverside, California, to-wit: "Ray is being punished for sleeping with Faye Lyons".

4. On February 14, 1956, at Scottsdale, Arizona, to-wit: "Ray shacked up with Faye Lyons".

5. On May 15, 1956, at Scottsdale, Arizona, to-wit: "Ray shacked up with Faye Lyons".

6. On March 26, 1956, at Phoenix, Arizona, to-wit: "Ray shacked up with Faye Lyons".

In Paragraph III plaintiff alleges and claims that defendant meant, by said statements, that plain-

Plaintiff's Exhibit No. 2—(Continued)

tiff was unchaste; that she lived in concubinage, and was guilty of a felony by reason of adultery as set out in Arizona Revised Statutes 13-221.

By the second cause of action of her complaint, said plaintiff alleges and claims that defendant falsely and maliciously filed a verified cross-complaint in the Superior Court of Riverside County, State of California, in that certain action entitled "George Chester Ray Gilliland, also known as G. Ray Gilliland, also known as Ray Gilliland, Plaintiff, v. Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, et al., Defendants, and Elsinore Machris Gilliland, also known as Elsinore C. Machris Gilliland, Cross-complainant, v. George Chester Ray Gilliland, also known as G. Ray Gilliland, also known as Ray Gilliland, Cross-Defendant, and Faye Lyons and Ann Meyers, Jane Doe and Mary Roe, Co-Respondents," being No. 62839 upon the register of [33] actions of the Clerk of said Court, in which it was alleged: "That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as 'Ray Gilliland and Family'."

Plaintiff's Exhibit No. 2—(Continued)

In Paragraph III plaintiff alleges and claims that defendant meant, by said statements, that plaintiff was unchaste; that she lived in concubinage, and was guilty of a felony by reason of adultery as set out in Arizona Revised Statutes 13-221.

Plaintiff claims compensatory damages in the sum of \$500,000.00 and exemplary damages in the sum of \$500,000.00.

By her third cause of action of her complaint, said plaintiff alleges and claims that defendant sought newspaper publicity, gave interviews to the press in an endeavor to have her story written in a magazine known as "Confidential", and that she often said "her public must be informed"; that by the defendant's endeavors there was published in the *Riverside Enterprise*, a newspaper of general circulation, on March 23, 1956, an article as follows, to-wit: "In her complaint for divorce, Mrs. Gilliland accuses her husband of having affairs with two socially prominent women at Lake Tahoe and other affairs in May, June and July of 1955 with two other women at his residence at 4717 N. 71st Pl., Scottsdale, Arizona, a suburb of Phoenix. Named as co-respondents in the counter complaint were 'Ann (Peggy) Meyers' and 'Faye Lyons'."

In Paragraph III plaintiff alleges and claims that defendant meant, by said statements, that plaintiff was unchaste; that she lived in concubinage, and was guilty of a felony by reason of adultery as set out in Arizona Revised Statutes 13-221. [34]

Plaintiff's Exhibit No. 2—(Continued)

Plaintiff claims to have been damaged thereby in the sum of \$500,000.00 compensatory damages and \$500,000.00 exemplary damages.

A-(1) Plaintiff has stated no separate cause of action for invasion of privacy and claims all of the statements alleged in the complaint are false and untrue, but plaintiff nevertheless claims a right to recover under the doctrine of invasion of privacy on each and every count. The decision on that matter is reserved to time of trial.

B. Answer of Defendant.

By her answer to each of the causes of action defendant denies each and all of the allegations of said Paragraphs III; denies that she made any of the defamatory statements alleged in said first cause of action; denies that the plaintiff was damaged thereby in the sum of \$500,000.00 as compensatory damages or in the [35] sum of \$500,000.00 as exemplary damages or any other sum or amount.

As a first affirmative defense to said first cause of action, defendant alleges that the supposed defamatory statements set forth in said cause of action are true.

By her answer to the second cause of action, the defendant admits that she verified a cross-complaint for divorce in said action No. 62839, which she caused to be filed on or about November 28, 1955; that in her second cause of action of said cross-complaint, it was alleged: "That, in May and June, 1955, the cross-defendant associated with, kept, and

Plaintiff's Exhibit No. 2—(Continued)

did commit adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as 'Ray Gilliland and Family.'” Denies that plaintiff has been damaged in the sum of \$500,-000.00 or any sum or at all.

As a first affirmative defense to said second cause of action, defendant alleges that the filing of the said cross-complaint containing said allegation is a privileged publication under the provisions of Sec. 47, subdiv. 2(3) of the Civil Code of the State of California, by reason of the following facts, alleged:

1. Said cross-complaint for divorce was verified by defendant.

2. Said allegations were made by the defendant in good faith and without malice.

3. At the time said allegations were allegedly made, defendant had good and sufficient reason to believe, and did honestly and reasonably believe, that said allegations were true, and defendant had reason and probable cause for believing the truth [36] of said allegations.

4. Said allegations were material and relevant to the issues of said action No. 62839.

5. Defendant did not in any other way publish

Plaintiff's Exhibit No. 2—(Continued)

the supposed defamatory words alleged in the said second cause of action.

As a second affirmative defense to said second cause of action, defendant alleges that said second cause of action fails to state a claim against defendant upon which relief can be granted.

By her answer to the third cause of action, the defendant denies that she sought newspaper publicity, gave interviews to the press, endeavored to have her story written in a magazine known as "Confidential," or that she often said, or at all, "her public must be informed"; admits that on March 23, 1956, there was published in the Riverside Daily Enterprise, a newspaper article in substantially the same words as are alleged in plaintiff's third cause of action; denies that she interviewed representatives of said newspaper or caused said article to be published; and denies that plaintiff was damaged by the publication of said newspaper article in the sum of \$500,000.00 as compensatory damages or in the sum of \$500,000.00 as exemplary damages or any other sum or amount.

As a first affirmative defense to the third cause of action, defendant alleges that the supposed defamatory statements are true.

As a second affirmative defense to said third cause of action, defendant alleges that, in so far as the allegations of the cross-complaint in action No. 62839 are incorporated in the said third cause of action, the said allegations are a privileged publica-

Plaintiff's Exhibit No. 2—(Continued)

tion under the provisions of Sec. 47, subdiv. 2 (3) of the Civil Code of the State of California, by reason of the facts stated in connection with the first affirmative defense to the second cause of action, namely:

1. Said cross-complaint for divorce was verified [37] by defendant.

2. Said allegations were made by the defendant in good faith and without malice.

3. At the time said allegations were allegedly made, defendant had good and sufficient reason to believe, and did honestly and reasonably believe, that said allegations were true, and defendant had reason and probable cause for believing the truth of said allegations.

4. Said allegations were material and relevant to the issues of said action No. 62839.

5. Defendant did not in any other way publish the supposed defamatory words alleged in the said second cause of action.

As a third affirmative defense to said third cause of action, defendant alleges and claims that said third cause of action fails to state a claim against defendant upon which relief can be granted.

II.

Federal jurisdiction is invoked upon the ground that the plaintiff is a citizen of the State of Florida and the defendant is a citizen of the State of California; that the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

Plaintiff's Exhibit No. 2—(Continued)

III.

The following facts are admitted and require no proof:

A. Plaintiff was, at the time of filing the amended complaint herein, a citizen of the State of Florida and the defendant was a citizen of the State of California, and the matter in controversy exceeded the sum of \$3,000.00, exclusive of interest and costs.

B. By her verified cross-complaint filed in said action No. 62839, in the Superior Court of Riverside County, California, the defendant alleged: "That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one [38] Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as 'Ray Gilliland and Family.'"

C. In said action No. 62839, in the Superior Court of Riverside County, California, Ray Gilliland, as plaintiff, sued Elsinore Machris Gilliland, as defendant, for divorce. By her cross-complaint therein, she sought a divorce against said Ray Gilliland on the grounds of extreme mental cruelty and adultery. The allegations of said cross-com-

Plaintiff's Exhibit No. 2—(Continued)

plaint, complained of by plaintiff here, were material to the issues in said action.

IV.

The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary: None.

V.

The following issues of fact, and no others, remain to be litigated upon the trial:

A. First Cause of Action:

1. Did the defendant, on August 10, 1955, at Palm Springs, California, in the presence of Earl Thomas or L. W. Anderson, state "Ray is shacking up with Faye Lyons."

2. Did the defendant, on December 21, 1955, at Riverside, California, in the presence of Ray Gilliland, Ida Barr or Phil Barnett, state "Ray is being punished for sleeping with Faye Lyons."

3. Did the defendant, on February 14, 1956, at Scottsdale, Arizona, in the presence of Mr. Turbeville, Mr. Carpenter or Mr. Phil Kent, state "Ray shacked up with Faye Lyons."

4. Did the defendant, on May 15, 1956, at Scottsdale, [39] Arizona, in the presence of Ida Barr, Paul Hayden, Frank Kerwin, Rita Kerwin or Patti Karger, state "Ray shacked up with Faye Lyons."

5. Did the defendant, on March 26, 1956, at

Plaintiff's Exhibit No. 2—(Continued)

Phoenix, Arizona, in the presence of Ida Barr, state "Ray shackled up with Faye Lyons."

6. If said statements were made, were they true.
7. If said statements were made, were they made with actual malice, or malice in fact.
8. If said statements were made, was the plaintiff damaged thereby and the extent of such damage.

B. Second Cause of Action:

1. Were the allegations of the cross-complaint, filed by the defendant in said action No. 62839, in the Superior Court of Riverside County, California, privileged under the Provisions of Sec. 47, subdiv. 2(3) of the Civil Code of the State of California, which involves the following issues of fact:

(a) Were the said allegations, made by the defendant, made in good faith and without malice.

(b) At the time said allegations were made, did the defendant have good and sufficient reason to believe, and honestly and reasonably believe, that said allegations were true, and did defendant have reasonable probable cause for believing the truth of said allegations.

(c) Did the defendant publish said alleged libelous statement other than by filing the cross-complaint in said divorce action.

2. If the said allegations of said cross-complaint in said action No. 62839 were not privileged, was the plaintiff damaged thereby and the extent of such damage.

Plaintiff's Exhibit No. 2—(Continued)

C. Third Cause of Action:

1. Was the article published in the *Riverside Daily Enterprise* on November 23, 1956, published by the endeavors of [40] defendant, or did she cause said publication to be made.

2. If the plaintiff establishes by the evidence that the defendant caused said article to be published in the *Riverside Daily Enterprise* on March 23, 1956, or that it was published by her endeavors, then the corollary issue of fact will be: Did the defendant seek publicity, give interviews to the press, endeavor to have written in a magazine known as "Confidential" a story in substance and effect the same as was published in the *Riverside Daily Enterprise* on March 23, 1956, as an element of malice. Otherwise, the said issue will not be involved.

3. Was the article published in the *Riverside Daily Enterprise* on March 23, 1956 true.

4. If said publication was a result of defendant's endeavors, or she caused same, did she act with malice.

5. If said publication was a result of defendant's endeavors, or she caused same, was the plaintiff damaged thereby and the extent of such damage.

VII.

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

Plaintiff's Exhibit No. 2—(Continued)

A. The plaintiff will offer in evidence the following documents:

1. A photostatic copy of the hospital and medical records of the Visalia Municipal Hospital, Visalia, California, from December 31, 1950 to January 27, 1951, for Ray C. Gilliland, also known as George Chester Ray Gilliland, also known as G. Ray Gilliland, attached to the deposition of Mary Elizabeth Bailey, filed with the Court in the above-entitled action on February 10, 1958.

2. First page of the Daily Enterprise newspaper for Friday, March 23, 1956, published at Riverside, California. [41]

3. Letter from Lindsey Hopkins Vocational School, Miami, Florida, certifying that Mrs. Faye Lyons attended the Hotel Front Office Cashiering class at the Lindsey Hopkins Hotel School from August 29, 1955, through October 23, 1955, without absence.

B. The defendant will offer in evidence the following documents:

1. A photostatic copy of the registration #2822 at the Colonial House, Las Vegas, Nevada, showing that Ray Gilliland registered himself and two other guests on 9-28-55 and departed on 9-29-55, in the following manner: "Ray Gilliland and Family, Gilliland, Texas"; also statement of the Colonial House, Las Vegas, Nevada, showing the charges to Ray Gilliland and Family therefor.

2. Verified statement of Blanche Lampert made

Plaintiff's Exhibit No. 2—(Continued)

at Scottsdale, Arizona, on November 2, 1955, in the presence of Elsinore Machris Gilliland and Wm. L. Murphey, and Velma Shanks, Court Reporter, a true copy of which is attached to the deposition of Wm. L. Murphey, filed with the Court in the above-entitled action on March 28, 1958. Defendant will contend that the exhibits listed as "1" and "2" directly above are material to the issue of privilege in making the allegations of defendant's cross-complaint in said action No. 62839.

3. Photostatic copies of Receipt #6258 dated June 14, 1955, issued by Ray Silverman, co-owner of the Paradise Valley Guest Ranch at Scottsdale, Arizona, to Mrs. F. Lyons. Also receipts #6364 and 6377, issued by Ray Silverman, co-owner of the Paradise Valley Guest Ranch, at Scottsdale, Arizona, to Mrs. F. Lyons. These receipts are attached as Exhibits 1, 2 and 3 to the deposition of Mr. Ray Silverman, filed with the Court in the above-entitled action on January 9, 1958. Said receipts will show that Faye Lyons occupied apartment One from June 14, 1955 to July 7, 1955 at the Paradise Valley Guest Ranch. [42]

VIII.

The following issues of law, and no others, remain to be litigated upon the trial:

A. Were the statements alleged to have been made by the defendant in the first cause of action of the amended complaint herein slanderous, per se.

B. Were the allegations of the cross-complaint

Plaintiff's Exhibit No. 2—(Continued)

filed by the defendant in said action No. 62839, in the Superior Court of Riverside County, California, privileged.

C. Is the defendant liable for the publication of the article in the Riverside Daily Enterprise on March 23, 1956, if the defendant did not endeavor to procure publication thereof or cause publication thereof.

IX.

The foregoing admissions have been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: May 12, 1958.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved as to form and content:

/s/ COIT I. HUGHES,
Attorney for Plaintiff,

/s/ WM. L. MURPHEY,
Attorney for Defendant. [43]

Affidavit of Service by Mail Attached. [45]

[Endorsed]: Filed May 12, 1958.

United States District Court, Southern District
of California, Central Division

No. 20301 WM

FAYE LYONS,

Plaintiff,

vs.

ELSINORE C. MACHRIS GILLILAND, also
known as ELSINORE MACHRIS GILLI-
LAND, Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

The above-entitled cause came on regularly for trial on June 3, 1958, in Department Two of the above-entitled court, William C. Mathes, Judge Presiding, the plaintiff, Faye Lyons, appearing by Coit I. Hughes, her attorney, and the defendant, Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, appearing by her attorneys, Wm. L. Murphey and John B. Anson, and evidence both oral and documentary having been offered and received on June 3, 4, and 5, 1958, and said cause having been argued and submitted on June 5, 1958, and the court having duly considered the evidence and being fully advised in the premises, makes the following:

Findings of Fact

I.

As to all causes of action: [47]

It is true that plaintiff was, at the time of filing the amended complaint herein, a citizen of the

State of Florida and the defendant was a citizen of the State of California, and the matter in controversy exceeded the sum of \$3,000.00, exclusive of interest and costs.

II.

As to the First Cause of Action:

(a) It is not true that the defendant, on August 10, 1955, at Palm Springs, California, in the presence of Earl Thomas or L. W. Anderson, stated "Ray is shacking up with Faye Lyons."

(b) It is not true that the defendant, on December 21, 1955, at Riverside, California, in the presence of Ray Gilliland, Ida Barr or Phil Barnett, stated "Ray is being punished for sleeping with Faye Lyons."

(c) It is not true that the defendant, on February 14, 1956, at Scottsdale, Arizona, in the presence of Mr. Turbeville, Mr. Carpenter or Mr. Phil Kent, stated "Ray shacked up with Faye Lyons."

(d) It is not true that the defendant, on May 15, 1956, or at any other date, at Phoenix, Arizona, or at any other place, in the presence of Ida Barr, Paul Hayden, Frank Kerwin, Rita Kerwin, Judge Samuel Blake, or Mrs. Samuel Blake, or any other persons, stated "Ray Gilliland had shacked up with Faye Lyons," or any other words of similar substance or import.

(e) It is not true that the defendant, on March 26, 1956, at Phoenix, Arizona, in the presence of Ida Barr, stated "Ray shacked up with Faye Lyons."

(f) It is not true that the defendant did, at any

time or place, state to any person in substance or effect that "Ray shackled up with Faye Lyons."

(g) It is not true that the defendant, at the times and places, and before the persons specified in plaintiff's amended [48] complaint on file herein, or as specified in the pre-trial conference order, Plaintiff's Exhibit 3 in evidence herein, or at any other time or place, or before any person or persons, state maliciously or otherwise in substance or effect, "Ray is being punished for sleeping with Faye Lyons," or "Ray shackled up with Faye Lyons," or any other words or statements of similar import or effect or imputing that plaintiff was unchaste, or that plaintiff lived in concubinage, or that plaintiff was guilty of or had committed adultery.

III.

It is not true that plaintiff was damaged thereby in the sum of \$500,000.00 or any other sum or sums as compensatory damages, or in the sum of \$500,000.00 or any other sum or sums as exemplary damages.

IV.

In view of the foregoing findings of fact, as to the first cause of action, the Court finds it is unnecessary to make any finding of fact as to the truth of the alleged oral statements, and the Court makes no finding of fact as to the truth of the allegations of the alleged oral defamation in said first cause of action.

V.

As to the Second Cause of Action:

It is true that, by her verified cross-complaint

filed in said action No. 62839, in the Superior Court of Riverside County, California, the defendant alleged: "That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one Fay Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight, and did commit adultery with one said Faye Lyons at the Colonial House, Las Vegas, Nevada, where [49] cross-defendant and said Co-Respondent were registered by him as 'Ray Gilliland and Family.'"

VI.

It is true that in said action No. 62839, in the Superior Court of Riverside County, California, Ray Gilliland, as plaintiff, sued Elsinore Machris Gilliland, as defendant, for divorce; that by her cross-complaint therein, she sought a divorce against said Ray Gilliland on the grounds of extreme mental cruelty and adultery; that said cross-complaint was verified by defendant; that the allegations of said cross-complaint, complained of by plaintiff here, were material and relevant to the issues in said action.

VII.

It is true that the aforesaid allegations were made by the defendant in good faith and without malice; that, at the time said allegations were made, the defendant did have good and sufficient reason to be-

lieve, and honestly and reasonably believed that said allegations were true and that the defendant, at said time, had reasonable and probable cause for believing the truth of said allegations; that the defendant did not publish said alleged libelous statements other than by filing the said cross-complaint in said divorce action; that said acts of defendant were privileged under the provisions of Section 47, subdiv. 2(3) of the Civil Code of the State of California.

VIII.

It is not true that the plaintiff was damaged by said publication in said action No. 62839 in the sum of \$500,000.00 or any other sum or sums as compensatory damages, or in the sum of \$500,000.00 or any other sum or sums as punitive damages.

IX.

No specific defense of truth having been raised by the answer to the second cause of action, and no such issue having been set [50] forth in the pre-trial conference order, Plaintiff's Exhibit 3 herein, the Court makes no finding of fact as to the truth of the allegations of the said cross-complaint in said action No. 62839.

X.

As to the Third Cause of Action:

It is true that, on March 23, 1956, there was published in the *Riverside Daily Enterprise*, a newspaper of general circulation, an article in substance as follows: "In her counter complaint for divorce, Mrs. Gilliland accuses her husband of having affairs with two socially prominent women at Lake Tahoe

and other affairs in May, June and July of 1955 with two other women at his residence at 4717 N. 71st Pl., Scottsdale, Arizona, a suburb of Phoenix. Named as co-respondents in the counter complaint were 'Ann (Peggy) Myers' and 'Faye Lyons.' "

XI.

It is not true that said article, as published in said Riverside Daily Enterprise on March 23, 1956, was published by the endeavors of defendant, or that defendant caused said publication to be made.

XII.

It is not true that the plaintiff was damaged by any act of defendant, in connection with the publication of said article, in the sum of \$500,000.00 or any other sum or sums as compensatory damages, or in the sum of \$500,000.00 or any other sum or sums as punitive damages.

XIII.

Right of Privacy:

A. It is not true that the defendant, by any act or thing made, done or performed by her, invaded any right of privacy of the plaintiff.

Conclusions of Law [51]

From the foregoing facts the Court concludes:

I.

That plaintiff take nothing on her said first cause of action.

II.

That the filing of said cross-complaint in action No. 62839 is a privileged publication under the pro-

visions of Section 47, subdiv. 2(3) of the Civil Code of the State of California, and that by reason thereof defendant is not liable to plaintiff for said publication and that plaintiff take nothing by her second cause of action.

III.

That defendant is not liable for the publication of the article in said *Riverside Daily Enterprise* on March 23, 1956, and that plaintiff take nothing on her third cause of action.

IV.

That defendant is entitled to recover her costs of suit herein from plaintiff in the sum of \$.....

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed:

I.

That the plaintiff take nothing by this action and that defendant have her costs and disbursements in this action to be hereinafter fixed on notice, and hereinafter inserted by the Clerk of this Court in the sum of \$200.12.

Dated: June 16, 1958.

/s/ WM. C. MATHES,
U. S. District Judge. [52]

Acknowledgment of Service Attached. [53]

[Endorsed]: Filed June 16, 1958. Entered June 17, 1958.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The plaintiff moves that the judgment entered herein be vacated and set aside and that a new trial be granted on the following grounds:

I.

Irregularity in the Pre-Trial Proceedings by the elimination of the issue of "truth" as to the slanders and libels from the case when "falsity" had been pleaded by the plaintiff and denied by the defendant;

II.

Accident at the trial in the failure by inadvertence and excusable neglect on the part of plaintiff's attorney to introduce defendant's deposition in evidence;

III.

Insufficiency of the evidence to justify the decision. The following specifications are urged: [54]

A. Finding II (a) to (g), both inclusive, are not supported by the fair weight of substantial and probative evidence, but are opposed to the weight of such evidence.

B. Finding III is not supported by the weight of substantial and probative evidence but is opposed to the weight thereof.

C. Finding IV is erroneous as setting forth a spurious excuse for omitting a necessary finding essential to the establishment of substantial justice in this cause.

D. Finding VII is opposed to the weight of substantial and probative evidence in that there is no evidence save the self-serving and self-contradicted statements of defendant herself to support the finding that she acted "in good faith" and "without malice" and that she honestly and reasonably believed that the allegations were true at the time they were made. The last three lines of said Finding are a conclusion of law.

E. Finding VIII is opposed to and is not supported by a fair preponderance of substantial and probative evidence.

F. Finding IX is erroneous as constituting a spurious excuse for omitting a necessary finding essential in the establishment of substantial justice in this case.

Dated: June 24, 1958.

/s/ WELBURN MAYOCK,
Attorney for Plaintiff. [55]

Affidavit of Service by Mail Attached. [56]

[Endorsed]: Filed June 24, 1958.

[Title of District Court and Cause.]

DEFENDANT'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR
NEW TRIAL

I.

The Court did not err in refusing to find on the issue of the truth of the charges of adultery

set forth in the cross-complaint filed by the defendant.

(A) Section 45 of the Civil Code of California defines "libel" as a "false and unprivileged publication by writing - - -, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Underscoring mine)

In Paragraph II of the Second Cause of Action of her complaint, the plaintiff alleged that defendant "maliciously verified and published of and concerning the plaintiff the false and malicious words following, to wit:" [57]

"That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight, and did commit adultery with one said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-respondent were registered by him as "Ray Gilliland and Family."

Paragraph II of the Answer to the Second Cause of Action admitted the filing of the Cross-complaint containing the said language; denied each and every other allegation of said Paragraph II of Plaintiff's Second Cause of Action not expressly admitted or alleged.

(B) The defendant did not affirmatively plead as

a special defense the truth of the said allegations of the Cross-complaint. Truth, as a defense to an action for libel or slander, must be affirmatively pleaded as a special defense.

Witkin Prac. Pleading, Sec. 540; 30 Cal. Jur. 2d "Libel and Slander" pp 145, p 769; Davis v. Hearst, 160 Cal. 143, at 187-194; Stevens v. Snow, 191 Cal. 58-64.

(C) Neither the plaintiff nor the defendant considered that truth or falsity of the allegations of the Cross-complaint were in issue. Counsel for both parties agreed to the form of the pre-trial order. No such issue was stated therein as to the Second Cause of Action. Plaintiff has waived and is precluded from asserting this issue at this time.

Fed. Rules of Civ. Proc., Rule 16; Fernandez vs. United Fruit Co. 200 Fed. (2d) 414 (1952); McCarthy vs. Lerner Stores Corporation, 9 F.R.D. 31 (1949). [58]

(D) Truth and Privilege are separate and distinct defenses. The Court can find and determine that the publication was privileged without making any finding as to truth or falsity of the publication.

Snively v. Record Publishing Co., 185 Cal. 565 at p. 575; (Note 5) Involving privilege under subsection (3) of Sec. 47 California Civil Code.

Freeman vs. Mills, 97 Cal App. (2d) 161 Involving privilege under subsection (1) and (2) of Sec. 47 Civil Code. These cases have been Shepardized and have not been over-ruled or distinguished on this point.

The Court, therefore, did not err in refusing to find on the truth or falsity of the alleged defamatory statements.

II.

The allegations of the cross-complaint were made by the defendant without malice; she had good and sufficient reason to believe and honestly and reasonably believed said allegations were true; and she had reasonable and probable cause for believing the truth of said allegation. (See Finding VII)

(A) Summary of evidence as defendant's knowledge prior to filing her Cross-complaint. The following is a summary of the defendant's knowledge at the time of filing her Cross-complaint.

Defendant testified in substance: Ray Gilliland was a habitual drinker; Ray Gilliland told her before her marriage that he had been intimate with two women in Florida. James Roach informed her that Ray Gilliland had been intimate with two women named Virginia Brown and Marilyn Lee at Lake Tahoe in July, 1954; that Ray Gilliland stopped to see them at their home, went into their bedrooms with them and later came out, that he gave them money. [59]

On January 2, 1955, she, Mr. Wm. L. Murphey and Mr. Maxwell Dorn went to Ray Gilliland's hide-away at Scottsdale; that there was lipstick on a cup of partially consumed coffee, lipstick on a lighted cigarette; that Wm. L. Murphey told her he had seen a woman's face at the bedroom curtains as they approached the house; that the defendant

told Ray Gilliland "There is a woman in this house"—that Ray Gilliland replied "So what!"

People in the neighborhood told her there were women at Ray Gilliland's house all the time. That defendant saw a photostatic copy of the registration of Ray Gilliland at the Colonial House, "Ray Gilliland and family."

She had a conversation with Wm. L. Murphey, her attorney, on the subject-matter of the Cross-Complaint charging adultery. She was present when Blanche Lampert's sworn statement was taken on November 2, 1955 (Exhibit 5).

(B) Summary of Blanche Lampert's Statement—Plaintiff's Exhibit 5.

Ray Gilliland abused Defendant over the phone; he told her she hadn't ought to live. He called her a "damned old bitch, you; you ought to die"; he threatened to shoot her. Just about every time Ray Gilliland talked to Mrs. Gilliland he called her a "bitch" or "God damned bitch". He said "How could anyone expect a guy to have anything to do with an old woman like that." He said he never would consummate the marriage.

In May, 1955, Ray was keeping Faye Lyons up at Paradise Valley Guest Ranch. I cooked [60] steak dinner for them there. One night he got mad at some friends, Blake and Kent, and Ray Gilliland went up there and stayed all night at Paradise Valley Ranch when Faye Lyons was there. Faye Lyons used to come down and stay until two or three o'clock in the morning at Ray Gilliland's house. They would sit there and drink together. Later

Mr. Gilliland and Faye Lyons went on a trip and came back. When they came back they brought Faye's boy with them. They got in a fight and Ray slapped her and she threw a glass at him—Faye Lyons broke a glass on him. When they came back she took the boy up to Paradise Valley Guest Ranch but she was down there at Ray Gilliland's house every day and I baby-sat with the boy or one of the neighbors did until two or three o'clock in the morning. She was there from May to June when she left. Ray Gilliland bought an automobile. I saw the title. He bought it on payments. Faye Lyons had it until he got mad at her and took it away from her. She drove it all the time. It was a Dodge I think he bought it from Ed Spears.

Blanche Lampert, called by the plaintiff as her witness, amplified on the incident of Ray Galliland staying at Paradise Valley in her testimony as follows:

Ray Gilliland had an argument one night. He drove Faye Lyons to Paradise Valley Guest Ranch. He did not come back that night. The next morning about 8:00 o'clock I drove my husband, Ray Lampert, to the Paradise Valley Guest Ranch where he worked as a gardener. I saw Ray Gilliland coming out of Faye Lyon's apartment. Mrs. Silverman, the owner, sure gave Ray Gilliland the dickens for staying there. [61]

This evidence was not controverted by Faye Lyons.

Mrs. Gilliland specifically testified that, at the time the Cross-complaint was verified and filed, she

did not bear Faye Lyons any ill will; she had no feeling of spite against Faye Lyons; she had no feeling of bitterness toward her; she did not bear any vindictive enmity toward Faye Lyons; and honestly believed the truth of the allegations of her Cross-complaint.

There was no evidence to the contrary except that at the time of the filing of the Cross-complaint Ray Gilliland had filed an action for divorce against the defendant upon the grounds of mental cruelty and that she had never had sexual intercourse with Ray Gilliland.

Defendant submits that Finding VII was supported by a preponderance of the evidence: that Mrs. Gilliland knew of Ray Gilliland's sexual inclination and propensity toward other women; that Ray Gilliland and Faye Lyons had opportunity to commit adultery; that the defendant honestly and reasonably believed in good faith that Ray Gilliland had committed adultery with the plaintiff; that she had reasonable and probable cause for believing the truth of said allegations; that she acted without malice toward the plaintiff in filing her cross-complaint.

III.

The Court would be justified from the evidence to find that the alleged libelous statements were true.

Without conceding the point, defendant asserts that, if the Court should believe that it is essential or proper to make a finding as to the truth of the

allegations of the Cross-complaint, there is ample evidence to support such a finding. The following is a summary of additional evidence.

(A) Faye Lyon's testimony. Faye Lyons testified in substance as follows: [62]

That she had been a chorus girl in George Cohan's production, George White's show and a vaudville act; she had been married and divorced twice; that from 1954 on she worked as a cigarette girl and hat check girl at a night spot known as L'Aiglon and the Felix Young Restaurant. In May, 1955, at the invitation of Mr. Ray Gilliland she went to Scottsdale. Ray Gilliland met her and took her to the Paradise Valley Guest Ranch. She admitted going to Ray Gilliland's house several times in the evening and that she may have had one or two highballs. The day she arrived she saw a car driving slowly near Ray Gilliland's house and she "became wary". Mr. Gilliland took her to the Paradise Valley Guest Ranch. She took a trip to Knox City in Ray Gilliland's car, stopped at Clyde Williams' home and visited with Judge Williams. After a few hours there all three drove to Forth Worth and stayed at the Hilton Hotel. They had three rooms together having interconnecting doors. She did not remember that Ray Gilliland introduced her to friends of Clyde Williams as "Mrs. Gilliland". He may have. They stayed at the Hilton Hotel for two nights. Ray Gilliland drove her to Miami, stopped at hotels on the way. Ray Gilliland registered and paid all the bills. Sometimes the rooms were adjoining but this was not of any importance. She

remained in Miami for about a week and returned to Phoenix by plane with her son. She stayed at the Paradise Valley Guest Ranch arriving about June 3rd or 4th. She remained there for about four or five weeks. Ray Gilliland and Clyde Williams brought a car there—a Dodge Sedan. [63] “He gave me the keys and said—here is a car to use. He may have said—this is your car, but I don’t remember it.” She used the car. Ray Gilliland gave her \$200.00 on one occasion to buy her son a dog. She took the money. She went out to dinner with him alone, to the Stock Yard Cafe and Italian Restaurant in Phoenix—to the movies. Ray Gilliland also took her and her son to a rodeo at Prescott but came back the same day. “Ray Gilliland wired me money for the plane trip to Phoenix.” She did not remember Ray Gilliland giving her money on other occasions but he may have.

The Testimony of Clyde Williams, offered by stipulation, was in substance as follows:

Faye Lyons and Ray Gilliland arrived at Knox City in May, 1955. They spent two or three hours at his home and that of his father Judge Williams. In the afternoon he, Faye Lyons and Ray Gilliland drove to Fort Worth and registered at the Hilton Hotel. Faye Lyons and Ray Gilliland had adjoining rooms with an interconnecting door, and Clyde Williams had a room several doors down the hall. All three spent the first evening at the Fort Worth Club; that he met some of his friends, introduced Ray Gilliland who, in turn, introduced Faye Lyons as “Mrs. Gilliland.” The next morning Ray Gilli-

land gave Faye Lyons some money to shop with. That night they had dinner at the Hilton Hotel after which Ray Gilliland and Faye Lyons retired to their rooms. I drove Ray Gilliland's car from Miami Beach to Scottsdale where I spent four or five days. Faye Lyons spent most of her [64] time at Ray Gilliland's house at Scottsdale. She hired a baby-sitter for her son. They did considerable drinking and night-clubbing. They often laughed at what Mrs. Gilliland would do if she knew what was going on. Ray Gilliland bought a new Dodge sedan, drove it with me to Paradise Valley Guest Ranch. Ray Gilliland gave Faye Lyons the keys, saying in substance: "It is all yours."

Testimony of Blanche Lampert. Blanche Lampert further testified in substance:

That she saw Ray Gilliland kissing Faye Lyons once or twice at the kitchen bar in his home. Some time in July or August of 1955, I overheard Ray Gilliland tell my husband that he would have nothing to do with women unless they came through the way he wanted them to.

Testimony of Frank Teich, Manager of the Hilton Hotel, Fort Worth, Texas. The deposition of Mr. Teich was in substance:

That during May or June, 1955, there was no registration for Ray Gilliland, Faye Lyons or Clyde Williams at the Hilton Hotel.

It may be fairly assumed that they registered under fictitious names.

Testimony of Raymond Silverman, Co-Owner of the Paradise Valley Guest Ranch. The deposition of

Raymond Silverman (Plaintiff's Exhibit 10) was in substance:

That there was no registration for Ray Gilliland or Faye Lyons at the Paradise Valley Guest Ranch.

The foregoing evidence, together with the evidence heretofore summarized, establishes by the great preponderance of the evidence that Ray Gilliland did commit adultery with Faye Lyons.

The act of adultery, like any other fact, may be established by circumstantial proof. Indeed, that is the usual way in which it [65] is proven.

Evans v. Evans, 41 Cal. 103.

Aston v. Aston, 14 C.A. 323. Circumstantial evidence suffices as proof of adultery.

Wilson v. Wilson, 124 C.A.655, 13 P.2d 376. Notwithstanding the denials of the parties, evidence of sexual inclination and of reasonable opportunity is almost invariably accepted by the courts as sufficient proof of adultery.

Schaub v. Schaub, 71 C.A.2d467, 162 P.2d 966 (citing Cal. Jur.)

The Court has jurisdiction to vacate the judgment and make a finding on the truth of the allegations of the Cross-complaint under Rule 59 of the Federal Rules of Civil Procedure. However, Defendant insists this finding is not essential.

Respectfully submitted,

/s/ WM. L. MURPHEY,
Attorney for Defendant.

[Endorsed]: Filed July 25, 1958. [66]

[Title of District Court and Cause.]

PLAINTIFF'S REPLY MEMORANDUM

Defendant devotes the first two and one-half pages of his Memorandum in Opposition to Plaintiff's Motion for New Trial to the proposition that the Court did not err on refusing to find on the issue of truth of the charges of adultery. Plaintiff will use defendant's own paragraph designation for the sake of clarity.

Page 1, par. A: This is historical only and serves as an opening explanation of the argument.

Page 2, par. B: This quotes law upon the undisputed proposition that Truth as a defense in an action of libel must be affirmatively pleaded as a special defense. Plaintiff agrees and will save the Court the labor of consulting:

Witkin, Practice and Pleading,

Davis vs. Hearst, 160 Cal. 143,

Stevens vs. Snow, 191 Cal. 58.

Page 2, par. C: Plaintiff must take issue here with the statement that "neither plaintiff nor defendant considered that [67] truth or falsity of the allegations of the cross-complaint were in issue". The evidence taken applied without restriction to all three causes of action. Defendant combed the life of plaintiff and the various states in which she lived in an attempt to prove her a lewd and dissolute woman. Pages 6 to 12 of his Brief recount the evidentiary scraps upon which it is claimed that the Court is justified in making a finding of "truth"

of the defamatory matter. In the face of all this, to allege that neither party "considered truth or falsity" is just not so.

Defendant quotes Rule 16 F.R.C.P. but gives no weight to the stated exception giving the Trial Court the right to modify to prevent manifest injustice.

The cases of *Fernandez vs. United Fruit Co.* 200 Fed. 2d 414, and *McCarthy vs. Lerner Stores*, 9 F.R.D. 31, both lay down the rule that if a party wishes to inject new issues at the trial he should ask to amend the pre-trial order. This is the rule on appeal. It is not the rule in the Trial Court where this case now lies before the Trial Judge who has jurisdiction to modify the pre-trial order in the interest of manifest justice.

But it is not the reinstatement of an issue which plaintiff seeks. Manifest justice requires a finding of an admitted fact, to wit: the fact that the defamatory matter was false. This is the state of the pleading. "Truth cannot be raised by a denial on the general issue". (See cases *supra* under par. A.)

The admitted fact should be the subject of a finding. The Court cannot legally find against an admitted fact. Nor can the Court legally leave the issue in doubt as it has done in this case. A woman who has a right to a finding that the accusation of adultery is false is not given justice by a finding that the Court decided not to find one way or another. This merely perpetuates the slur and gives rise to the inference that the accusation was true but that the Court mercifully kept silent. A [68]

woman of good character and a woman of doubtful character stand far apart in social esteem.

As to the libel in the second cause of action, plaintiff has a right to a finding on an admitted fact. Manifest injustice will result by giving her anything less.

Niceties of argument which lose sight of the purposes of Rules of Civil Procedure for District Courts should find no place in the interpretation of such rules. *Thomas French & Sons, Ltd., vs. Carleton Venetian Blind Co.*, 1 F.R.D. 178-9.

Page 3, par. D: Plaintiff concurs that Truth and Privilege are distinct defenses in a libel action. Why then does defendant recoil from the obvious deductive conclusion that if truth is not pleaded, falsity is admitted and the Court should so find? A startling non-sequitur is proposed instead, i.e. "The Court, therefore, did not err in refusing to find on the truth or falsity of the alleged defamatory matter". At this point logic shrieks as Freedom is said to have shrieked when Kosciusko fell.

When a woman is untruthfully defamed in a privileged libel, she is entitled to some remedy. Self-help is denied her. Compensatory damages is denied her. But the law does not completely fail her. She can have at least such official finding of her good character as follows from the official finding that the defamation was false. Section 3523, Civil Code of California, is a hideous lie if this is not true. No better proof of the malice of the defendant in this case can be shown than the record of persistent and unflagging insistence at all times in

this litigation that her slur shall be perpetuated and given official sanction by this honorable Court.

Defendant next seeks to show that her defense of privilege was good and that she carried her burden of proof of the following facts: [69]

1. That she acted without malice,
2. That she had good and sufficient reason to believe the allegations were true,
3. That she honestly and reasonably believed them,
4. That she had reasonable and probable cause for believing them.

Plaintiff respectfully submits that defendant has failed to carry her burden on any of the four propositions listed.

The learned Court at oral argument narrowed the argument considerably by conceding three basic points:

1. Defendant must rely solely upon information she had at the time of publication of the libel,
2. What is reasonable or probable or sufficient must be tested by the standard of a "reasonable man" and not by her subjective standard,
3. Defendant is bound by her own testimony as to the nature and extent of the information upon which she relied.

At the time of the publication she had and relied upon this information and no other:

1. The Blanch Lampert Statement, Exhibit 5,
2. What her husband had told her, prior to their marriage,

3. What neighbors had said and what James Roche said,

4. What her attorney told her,

5. The incident of Jan. 2, 1955, i.e., lipstick and a woman viewed by her attorney through a window,

6. Photostat of Colonial Inn registration.

Can what her husband told her before her marriage provide any "reasonable", or good and sufficient reason or give reasonable or probable cause for a reasonable man to accuse Fay Lyons of adultery on the night of September 28, 1955 at the Colonial Inn in Las Vegas with Ray Gilliland? One must answer "yes" to this absurdity if conditional privilege depends upon this evidence as [70] necessary. The attitude of the Court at oral argument convinces counsel that this evidence is worthless.

The neighbors merely stated that they had seen women playing in defendant's husband's yard. No women were identified. The neighbors stand unidentified. No time was stated. This evidence and that of James Roche about a Lake Tahoe incident with other women cannot justify defamation of Fay Lyons in Arizona and in Nevada.

The attorney's statement is valueless because we do not know what he said. The attorney's peeping into the window is valueless because he does not state who the woman was. The incident of the lipstick on Jan. 2, 1955 is wholly unrelated to Fay Lyons who came to Arizona twice during the summer of 1955, i.e., in June and in July.

If this sort of testimony justifies an accusation

of adultery, the world has become a paradise for gossips and scandalmongers.

It is true that insufficient evidence standing alone can be cumulated into significance by adding additional evidence. This rule is but the mathematical truth that any positive number added to another positive number will equal a sum greater than either taken alone. We urge another rule that evidence wholly unrelated or not legally relevant cannot be cumulated into relevant evidence. Here we approximate the other mathematical truth that zeros can be infinitely added to zero and the sum will still be zero.

The photostat of the Colonial Inn register in Las Vegas is in no way connected with Fay Lyons. The defendant was told by Blanch Lampert that Fay Lyons did not go to Las Vegas, but on the contrary went home to Miami. Lampert Statement, Exhibit 5, p. 12, lines 2-4.

It follows that any justification for the libel or proof to sustain privilege must be found in the Blanch Lampert Statement, [71] Exhibit 5. The defendant first testified that all she knew about her accusations of Fay Lyons at the time of publication came from Blanch Lampert and Ray Gilliland. We have eliminated the Ray Gilliland Statement as valueless, being made years before and prior to his marriage to defendant.

Partial Transcript, p. 18, Question by the Court: "The question is, as I understood it, did you have any other information except what you heard at

that deposition (Exhibit 5) and what your husband told you?"

Witness (defendant): "No, I did not".

(Note: Parentheses supplied for clarification.)

The defendant also testified that she first met Blanch Lampert at the taking of her statement Exhibit 5 and never talked with her again prior to the publication of the libel. Reporter's Partial Transcript, p. 15.

Plaintiff suggests that a reading of some seventy lines in Blanch Lampert's Statement constitutes the sole justification which Defendant urges to sustain her burden of proving "good faith", "lack of malice", "good and sufficient reason to believe", and "reasonable and probable cause to believe" that Fay Lyons committed adultery with defendant's husband at specific times and places in Arizona and Nevada. Plaintiff rests her reputation on the proposition that the Blanch Lampert Statement fails to present any facts which would lead a reasonable man to honestly believe that plaintiff was an adulteress.

"By their fruits ye shall know them." Counsel at oral argument urged the well-considered rule that the subjective events of a person are more accurately revealed by the conduct than by the words of the subject. Quotations from the Sermon on the Mount, the Philosophers, and the Poets coincided with the changeless wisdom of the East in establishing this maxim. Perhaps I [72] quoted too much, so I will not repeat my sources here. I only quoted to show that what I said was based upon

a higher authority than that afforded by my own unaided thought.

At the trial, defendant, out of context and purely by volunteer statement, ventured the highly self-serving assurance that "I bear no malice against these people, not any whatsoever". Rep. Partial Transcript, p. 17, lines 14-15. This is what defendant says. Let us draw a few inferences from what she does:

1. She swore to the truth of the specific libels on the sole evidentiary basis of the Blanch Lampert Statement,

2. She made no effort to serve Fay Lyons, although she knew Fay Lyons lived in Miami, Exhibit 5, p. 6, line 16, p. 12, line 3,

3. She did not seek substituted service as provided in Sec. 1019, C.C.P.,

4. She made no attempt to press the adultery charge,

5. Only when sued for libel did she scour the country to seek out Fay Lyons and to seek out all phases of her life from childhood onward, eager to find something to complain of and upon which an inference could be built up that Fay Lyons was an adulterous woman,

6. She admits the defamatory matter in the libel is untrue by merely pleading to the general issue. This is an admission as a matter of law. Evidence for the purpose of proving truth is not even admissible in evidence. *Davis vs. Hearst*, 160 Cal. 143, at 194, lines 11-16.

The proviso in C.C.C. 47-2 upon which defendant relies was not enacted until many years after Davis vs. Hearst, but what was admissible only for justification by way of mitigating damages at the time of Davis vs. Hearst, *supra*, is now admissible only for justification because privileged in our present code. Thus, not only is falsity admitted by the pleadings, but proof of truth by [73] the defendant was prevented by the inadmissibility of evidence for such purpose.

7. Note defendant's pretense of injured innocence in the Blanch Lampert Statement when she breaks into the statement with a self-serving declaration, p. 4. This was clearly a prompting of Blanch Lampert. Note how Blanch obliges and defendant's attorney pursues the point. The eagerness for unfair advantage is compatible with a malicious motive, not with an honest one.

8. After suit, when her investigation, nation-wide in scope, as shown by the questions asked Fay Lyons on her deposition and on cross-examination, failed to prove adultery, she persisted in striving to perpetuate her slur under cover of court procedure. A noble nature admits a wrong and seeks to make reparation. When the opposite conduct is shown, the conclusion is justified that the opposite nature dictated the conduct and that malice and not nobility supplied the motive.

9. And now even after trial when the terror of monetary loss has been removed, see how she seeks to perpetuate her unproven slur by fighting to prevent the pitiful effort of a mother to recapture

a few shreds of reputation for the consolation of her little son.

I omit consideration of all evidence related at the trial and set forth at p. 5, lines 22-32 and p. 6, lines 1-21 of defendant's brief for the obvious reason that we are only considering justification as of November 26, 1955. What defendant was told thereafter at the trial can have no bearing on the question of justification or privilege as of the date of publication, Nov. 26, 1955. *Davis vs. Hearst*, 160 Cal. 143, at p. 195.

Par. III, p. 6-10: Defendant obstinately refuses to observe his own authorities in this section of his brief. Defendant [74] did not plead Truth. Therefore Falsity stands admitted. Pleading by denial, to the general issue, does not raise the issue of Truth. The evidence referred to is only admissible to prove the elements of conditional privilege and not for the purpose of proving the "truth" of the libel. *Davis vs. Hearst*, (*supra*).

The cases cited in defendant's brief p. 10 to the effect that adultery can be proved by circumstantial evidence are not relevant. They are not objected to; they merely do not apply. We are contending for a finding on an admitted fact. A trial court cannot make a finding in conflict with an admitted fact.

Rebuttal

Having now completed answer to defendant's brief, plaintiff, at the risk of being repetitious, will briefly recapitulate her position in chief.

I.

1. Malice is inferred from the publication. C.C.C. sec. 48, *Davis vs. Hearst* (supra).

2. A person intends the ordinary consequences of his voluntary acts. C.C.P. 1963:3.

3. The following presumptions and no others are deemed conclusive: a malicious and guilty intent from the deliberate commission of an unlawful act done for the purpose of injuring another * * * C.C.P. 1962:1.

4. A true or false defamation is a crime. Sec. 248, 249, Calif. Penal Code. Truth plus justification is a complete defense. Sec. 251, Calif. Penal Code.

The alleged libel was published November 26, 1955. If defendant can legally prevail she must affirmatively prove conditional privilege as of that date. The only justification in evidence and the sole legally relevant evidence against Fay Lyons is the Blanch Lampert Statement. If that statement justifies specific charges of adultery by Fay Lyons at specified times and in [75] specified places, defendant will have sustained the burden of proof as to privilege. If that statement does not justify specific charges of adultery by Fay Lyons at Specific times and in specific places, defendant has not proved privilege and the decision is erroneous.

II.

The Court erred in failing to find that the defamatory matter was false. It appears that the error, on the part of defendant's counsel at least,

stems from not properly distinguishing an "issue" from a "finding". Material facts admitted in the pleadings leave no "issue" but still require a "finding". On appeal the Courts assume the finding sometimes to correct the unsubstantiated judgment of the Court below, the Court treating them as if they were properly found. *Mondini vs. Labaig*, 44, Cal. App. 781, *Sacre vs. Chalupnik*, 188 Cal. 386, *Estate of Cover*, 188 Cal. 133.

A finding by the Court against a material admission in a pleading is a ground for reversal. *Estate of Cover* (supra), *Faulkner vs. Rondoni*, 104 Cal. 140, *Romer vs. Wehner*, 61 C.A. 411.

Finding X is against a material admission and is therefore such error as constitutes a ground for reversal. Plaintiff's right to a finding of "falsity" is not satisfied by a finding which leaves the matter in doubt and affords justification for scandalous inferences of truth.

The legal agility by which the learned Court avoided a finding in causes of action 1 and 3 where "truth" was pleaded by "not reaching the issue" and in the second cause of action where truth was not pleaded by was reached, by the expedient of juristically jumping over the obstacle and finding on the issue of privilege which would not have been reached at all if "truth" had been found, does not afford a good pattern for judicial precedent and is discordant with the harmonious judicial character of this Court.

"Fiat justitia ruat coelum" was disregarded. Doubtless other worthy maxims from other fields provided the more attractive solution.

Counsel feels that he could show no more respectful regard for this Court than is being shown in this proceeding by affording this opportunity for reconsideration and correcting this finding.

Necessity of Finding of Falsity

A last instance of venom on the part of defendant is the parting shot of her attorney, p. 10, lines 11-13. Here, under the pretense of quoting a rule of Court, a distortion, engendered in malice, occurs. Rule 59 does not give this Court jurisdiction "to vacate the judgment and make a finding on the truth of the allegations". It merely provides in this context that the Court may amend or make new findings. The statement on its face asserts that the power can be exercised in only one way. "*Expressio unius est exclusio alterius*".

And now we come back like the grief-stricken children over Mignon's grave to plead for justice. And only as suppliants does our law permit us to come.

"For every wrong there is a remedy". This maxim was intoned by the juris-consults of ancient Rome, has been enshrined in the Pandects of the monumental Code of Justinian and has been rewritten as Section 3523 of the Civil Code of the State of California.

To falsely accuse a woman of adultery is a wrong. If it is done under conditions of privilege, the wrong is not removed. The legal remedy, however, has been seriously impaired. Like the owner of an outlawed note, the right remains, but the

remedy is withheld. Since the reign of Theodosius II, matters of public policy have justified the withholding of the remedy, leaving the right unimpaired. Considerations of Public Policy also impelled [77] the statutory doctrine of privilege, but only insofar as immunity of the libellant was concerned. Insofar as power still remains in a Court to do justice and let right prevail, it is the obligation of the Court to do it. If some of the value of reputation can be salvaged by a judicial finding of the falsity of the charge, a Court cannot legally escape its obligation by withholding this available form of relief.

Respectfully submitted,

/s/ WELBURN MAYOCK,

Attorney for Plaintiff. [78]

Affidavit of Service by Mail Attached. [79]

[Endorsed]: Filed August 5, 1958.

[Title of District Court and Cause.]

ORDER ON PLAINTIFF'S MOTION FOR A NEW TRIAL

This cause having come before the Court for hearing on plaintiff's motion, filed June 24, 1958, for a new trial; and the motion having been argued and submitted for decision;

It Is Ordered that plaintiff's motion for a new trial is hereby granted as to plaintiff's second claim or cause of action only, and that in all other respects the motion for a new trial is hereby denied. [See: Cal. Civ. Code § 47-2 (3); *Davis vs. Hearst*, 160 Cal.

143, 195, 116 Pac. 530, 552 (1911); Tingley vs. Times-Mirror Co., 151 Cal. 1, 26, 89 Pac. 1097, 1107 (1907).]

It Is Further Ordered that the case is hereby placed on calendar for Pre-Trial Conference pursuant to Local Rule 9 at 9:30 A.M. on November 3, 1958, and that formulation and presentation of an amended Pre-Trial Conference [80] order in accordance with Local Rule 9 (j) shall constitute sufficient compliance with the pre-conference requirements of the rule.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

September 29, 1958.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed September 30, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that portion of the Order on Plaintiff's Motion for a New Trial of the above entitled cause, entered in this action on the 30th day of September, 1958, which provides as follows:

"It Is Ordered that plaintiff's Motion for a New Trial is hereby granted as to Plaintiff's Second Claim or Cause of Action only. * * * (See: Cal. Civ. Code § 47-2 (3); Davis v. Hearst, 160 Cal. 143, 195, 116 Pac. 530, 552 (1911); Tingley v. Times-Mirror Co., 151 Cal. 1, 26, 89 Pac. 1097, 1107 (1907).)"

Dated: October 30, 1958.

WM. L. MURPHEY and
JOHN B. ANSON,
/s/ By WM. L. MURPHEY,
Attorneys for Defendant. [82]

Proof of Service by Mail Attached. [83]

[Endorsed]: Filed October 30, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 94, inclusive, containing the original:

Complaint, filed 8/9/56

Amended Complaint, filed 11/20/56

Notice of Motion to Strike from Amended Complaint, with memorandum of points and authorities in support thereof

Minute Order 12/10/56

Answer to Amended Complaint
Pre-Trial Conference Order (Plaintiff's Exhibit 2)

Findings of Fact, Conclusions of Law and Judgment

Motion for New Trial

Defendant's Memorandum in opposition to Plaintiff's Motion for New Trial

Plaintiff's Reply Memorandum

Order on Plaintiff's Motion for New Trial

Notice of Appeal

Designation by Appellant of the Record on Appeal

Affidavit and Order for extension of time for filing and docketing record on appeal, filed 12/10/58

Affidavit of service by mail re affidavit and order for extension of time, etc., re appeal, filed 12/15/58

Stipulation and Order extending time for filing and docketing record on appeal, filed 1/14/59

Stipulation and Order extending time for filing and docketing record on appeal, filed 2/17/59.

B. Plaintiff's Exhibits 1 to 12, inclusive.

Defendant's Exhibits A to D, inclusive.

C. Five volumes of Reporter's Official Transcript of proceedings had on:

June 3, 1958; June 4, 1958; June 5, 1958; and July 21, 1958.

Dated: February 27, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk,

/s/ By WM. A. WHITE,
Deputy Clerk.

In the United States District Court, Southern
District of California, Central Division

No. 20301-WM

FAY LYONS,

Plaintiff,

vs.

ELSINORE C. MACHRIS GILLILAND, also
known as ELSINORE MACHRIS GILLI-
LAND, Defendant.

No. 20302-WM

ANN MEYER,

Plaintiff,

vs.

ELSINORE C. MACHRIS GILLILAND, also
known as ELSINORE MACHRIS GILLI-
LAND, Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
Tuesday, June 3, 1958

Honorable William C. Mathes, Judge Presiding.

Appearances: For the Plaintiff: Coit I. Hughes,
Esq., 208 West 8th Street, Los Angeles 14, Cali-
fornia. For the Defendants: Messrs. Wm. L. Mur-
phey and John B. Anson, 835 Rowan Building, Los
Angeles 13, California. [2]*

* * * * *

The Court: I have been over the pretrial con-

* Page numbers appearing at top of page of Reporter's Tran-
script of Record.

ference orders. I assume the originals have been signed. Have they?

Mr. Murphey: That is my information, your Honor.

The Court: I assume that Judge Hall signed them. I haven't seen the originals. I was only looking over the copies in my own file.

Are they signed, Mr. Clerk?

The Clerk: Yes, your Honor, they were signed on May 12th.

The Court: You may proceed then, Mr. Hughes.

The clerk has handed me a stipulation as to certain facts in the Lyons case, Case No. 20301, signed by the parties.

Have any exhibits been marked? [4]

Mr. Hughes: Just those attached to the pretrial order that are stated in the pretrial order, your Honor.

The Court: I don't believe they are stated to be marked. They are listed. Have any of them been marked by the clerk?

Mr. Hughes: No, sir, they have not.

The Court: Do you wish to offer the stipulation in the Lyons case?

Mr. Hughes: I do.

Mr. Murphey: No objection.

The Court: Received in evidence. The clerk can file it and mark it Exhibit 1 in evidence.

(The exhibit referred to was marked Plaintiff's Exhibit 1 and received in evidence in Case No. 20301-WM.) [5]

ELSINORE MACHRIS GILLILAND

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Elsinore Machris Gilliland.

Direct Examination

Q. (By Mr. Hughes): Where do you reside, Mrs. Gilliland?

A. 475 Borrado Norte, Palm Springs, California.

Q. Were you married to one Ray C. Gilliland?

A. I was.

Q. What was the date of your marriage?

A. May 3, 1953.

Mr. Murphey: Stipulated it was 1954, counsel, if you desire.

The Witness: '54.

Mr. Murphey: Do you desire the stipulation?

The Court: Do you accept the stipulation, Mr. Hughes?

Mr. Hughes: Yes, your Honor, but I will appreciate [7] it if counsel wouldn't interrupt the witness like that to lead her in that way.

The Court: Well, I don't know whether the date is crucial or not. I assumed it wasn't. So it may as well be correct.

Mr. Hughes: No, it wasn't.

Q. (By Mr. Hughes): Mrs. Gilliland, where did you live on May 4, 1954?

A. On May 4, 1954, I lived at 475 Borrado

(Testimony of Elsinore Machris Gilliland.)

Norte, Palm Springs. Also, at 1035 Orange Grove Avenue, Pasadena.

Q. Did Mr. Ray C. Gilliland reside with you at those addresses on those dates? A. Yes.

Q. Did he reside with you in September 1954?

A. I believe he had left in September.

Q. Where did you reside in September?

A. 1035 Orange Grove Avenue, Pasadena.

Q. And where did Mr. Gilliland reside?

A. I do not know. I think it was in Arizona at the Westward Ho.

Q. Did you file an action against Mr. Gilliland in Nevada in the fall of 1954?

A. Nevada? No, sir.

Q. Where did Mr. Gilliland reside in January of 1955?

A. 1955? I believe he resided in Scottsdale in 1955. [8]

Q. And where was that in Scottsdale?

A. It was out at Thornwood Acres. That is all I know. I do not remember the address. 71st Street, I think.

Q. Did you reside in Scottsdale in January 1955? A. Yes.

Q. Where did you reside?

A. On Sajuaro Road.

Q. When did you commence to reside on Sajuaro Road in Scottsdale, Arizona?

A. It was in the spring of 1955, I believe.

Q. When did Mr. Gilliland commence to reside in the house on 71st Street?

(Testimony of Elsinore Machris Gilliland.)

A. I do not know. He had the house and he would go there from time to time as a hideaway. I didn't know anything about the house for months.

Q. When did you purchase the house then up on Sajuara Road? A. I beg your pardon?

Q. Did you purchase the house on Sajuara Road? A. Yes, sir.

Q. When was that?

A. I purchased it in November 1954, I think. I am not sure.

Q. Did Mr. Gilliland ever reside in that house on Sajuara Road with you? [9]

A. No, he did not.

Q. Where did he reside during that time?

A. On 71st Street.

Q. And what was that, four or five blocks from your Sajuara Road house? A. Several miles.

Q. Did you file a lawsuit against Mr. Gilliland in January 1955? A. I think I did.

Q. Did you file a lawsuit, too, in Maricopa County, Phoenix, Arizona; and one in Los Angeles County, Los Angeles, California?

A. I believe so.

Q. Can you tell me what happened to those lawsuits? A. We became reconciled.

Q. What was the subject matter of those lawsuits?

Mr. Murphey: Just a moment. I will object to this line of questioning as being incompetent, irrelevant and immaterial, not having any bearing whatsoever on any of the issues of this case .

The Court: What is the purpose of it?

(Testimony of Elsinore Machris Gilliland.)

Mr. Hughes: The purpose of this line of questioning, your Honor, is to establish that these two persons were in a long line of feuding; that——

The Court: Perhaps that can be stipulated, can't it? [10]

Mr. Murphey: I will stipulate that Mr. and Mrs. Gilliland separated and reconciled several times.

The Court: Does that cover it?

Mr. Hughes: I don't believe so, your Honor, because I am going——

Mr. Murphey: I will be more specific, with the court's permission. I will stipulate, Mr. Hughes, that in January 1955 she filed a suit for annulment and a divorce against Mr. Gilliland at Riverside. She filed a suit to collect two promissory notes aggregating \$350,000 against Mr. Gilliland, one in Maricopa County, Arizona, and one in Los Angeles County, California, and one in Reno, Nevada upon the promissory notes.

I will stipulate that later, and as I recall about May or June of 1955, each of those suits was dismissed without prejudice; that time there being apparently a reconciliation.

The Court: So stipulated?

Mr. Hughes: Well, if your Honor please, there is a correction there. No. 1 is that the actions in Reno, Nevada, and Los Angeles and Maricopa Counties were filed on or about January 4, 1955.

The Court: Mr. Hughes, unless there is some point in it, I assume that when a man and his wife

(Testimony of Elsinore Machris Gilliland.)
are fighting each other in divorce courts there is no particularly good [11] feeling between them.

Now, does that help any?

Mr. Hughes: That helps, your Honor.

The Court: I don't suppose there would be any opposition to that assumption on the part of the defendant.

Mr. Murphey: Not while they are fighting.

Q. (By Mr. Hughes): Mrs. Gilliland, you filed an action for annulment known as Proceeding 61361 in the County of Riverside, State of California, and the action was filed March 8, 1954. Do you recall? A. 26161.

Mr. Murphey: Objection, if the court please, as incompetent, irrelevant and immaterial; outside the issues of the facts as framed by the pretrial order. Also, the basic fact has been stipulated that it had been filed.

Mr. Hughes: If your Honor please, there is an allegation in the——

The Court: Why don't you offer the pretrial order. That covers it, doesn't it? It covers a great many facts that are admitted. Do you want to offer those, or read them into the record? I think you might save a great deal of time if you just offer the pretrial conference order in each case. It covers practically everything, doesn't it?

Mr. Hughes: Well, your Honor, it covers practically everything except the parts which I filed the motion to be [12] heard on yesterday; and this is part of the foundation leading up to the testimony

(Testimony of Elsinore Machris Gilliland.)
in regard to that motion.

The Court: The objection will be sustained at this point.

Do you wish to offer the pretrial conference order?

Mr. Hughes: Yes, your Honor, I do.

The Court: In the Lyons case it will be received as Exhibit 2, and in the Meyers case as Exhibit 1.

(The exhibit referred to was received in evidence as Exhibit 2 in Case No. 20301-WM and Exhibit No. 1 in Case No. 20302-WM.)

Mr. Hughes: In addition to the documents listed in the pretrial conference order, your Honor, plaintiff wishes to introduce into evidence the cross-complaint for divorce in No. 62839 in Riverside County.

Mr. Murphey: As a matter of inquiry, your Honor, by him offering the pretrial order, am I to assume that the documents thereto that are attached are offered?

The Court: Are there some documents attached to the pretrial order?

Mr. Murphey: Yes, your Honor.

The Court: I should assume that everything that is a part of the order is in. I had no knowledge of any documents being attached.

Mr. Murphey: Well, I will object. [13]

The Court: What is attached?

Mr. Murphey: Well, there are letters and other documents for which there is absolutely no foundation.

(Testimony of Elsinore Machris Gilliland.)

The Court: Attached to the pretrial conference order?

Mr. Murphey: That is my understanding of the documents.

The Court: Well, let's find out. I never heard of such a practice. I never heard of exhibits being attached to the pretrial conference order.

Mr. Murphey: Statements of exhibits that counsel proposes to offer.

The Court: Well, there may be a list of exhibits, but that doesn't mean anything.

Mr. Murphey: Well, that's all right, but——

The Court: It is just a listing, isn't it?

Mr. Murphey: Yes. But I don't want to be understood as not objecting to the documents attached.

The Court: Very well.

Mr. Murphey: As to the current document I will object as being incompetent, irrelevant and immaterial in view of the pretrial order determining the allegations in the cross-complaint in this action. They have been admitted by the pleadings and the pretrial order.

The Court: The clerk calls my attention to the [14] fact that there's attached to the pretrial conference order in the Lyons case a registration, a definitive statement with respect to it, apparently a photocopy. "Colonial House registration." That is all that appears to be attached to the pretrial conference order in that case.

Do you have the other one, Mr. Clerk?

What is the purpose of offering the cross-com-

(Testimony of Elsinore Machris Gilliland.)

plaint? It's admitted that you allege certain facts. Isn't that all you want to show? Is there any particular reason to have the document?

Mr. Hughes: Well, there are other things alleged in the cross-complaint which I think are evidence of malice injected here.

The Court: Very well. It will be received in evidence.

Why did you put it in the pretrial conference order? Why did you put it in the agreed facts. There is no need of duplicating. We have just wasted time in pretrial conference if you are going to do it all over in the courtroom now.

Very well. It will be received in evidence. In what case?

Mr. Hughes: Both of them, your Honor.

The Court: In both cases.

We will receive it in the Lyons case Exhibit 3. Is that right, Mr. Clerk? The minute complaint, the cross-complaint. [15] It's on your desk there, is it not?

Do you see it, Mr. Clerk?

The Clerk: I see it now, your Honor.

The Court: It will be Exhibit 3 in the Lyons case and Exhibit 2 in the Meyers case.

(The exhibit referred to was received in evidence as Exhibit 3 in Case No. 20301-WM and Exhibit No. 2 in Case No. 20302-WM.)

The Court: I don't find any exhibits at all attached to the pretrial conference order in the Meyers case.

(Testimony of Elsinore Machris Gilliland.)

Q. (By Mr. Hughes): Mrs. Gilliland, were you in Riverside, California, on December 20, 1955?

Mr. Murphey: I would object to the question as being incompetent, irrelevant and immaterial; not the date determined as an issue of fact under paragraph V, subparagraph 2.

The Court: Please read the question, Mr. Reporter.

(Question read.)

The Court: Overruled. You may answer.

The Witness: I do not know. I do not remember the dates. I was in Riverside, but I do not remember what dates.

Q. (By Mr. Hughes): Did you have a conversation with one Ida Barr in the Mission Inn on or about that date? A. I believe so.

Q. Where did this conversation take place? [16]

A. In the lobby at the Hotel Mission Inn.

Q. And who was present?

A. Just Miss Barr and myself.

Q. Do you recall what was said?

A. Yes. I asked her how Mr. Gilliland was doing. He was very ill. He had been ill. He had been operated on and he was in court, going to court. And I asked her what condition he was in. And that is all.

Q. That was all you said?

A. That is all I said. She answered me.

Q. You didn't say anything else besides, "How are you? How is Mr. Gilliland?"

(Testimony of Elsinore Machris Gilliland.)

A. I asked her how Mr. Gilliland was, how he was coming on.

Q. Did she say anything to you?

A. She told me he was not very well, that he was a very sick man.

Q. And this was December 1955, the 20th?

A. I believe so.

Q. Did you see Mr. Gilliland in November of 1955? A. I do not remember.

Q. Did you see and talk to him at the St. Joseph's Hospital in November 1955?

A. No, I did not. 1955? When was that conversation in Riverside?

Q. December 1955. [17]

A. No, I did not see him at St. Joseph's Hospital in 1955.

Q. Did you see him when he was operated on the first time? A. No, I did not.

Mr. Murphey: I am going to object.

The Court: There is nothing before the court. Put your next question.

Mr. Murphy: I move to strike the last answer for the purpose of objecting to the question as being incompetent, irrelevant and immaterial to any issue in this case.

The Court: The motion is denied.

Your next question, Mr. Hughes?

Mr. Hughes: Yes, your Honor.

Q. (By Mr. Hughes): Do you recall the 26th day of November, 1955?

(Testimony of Elsinore Machris Gilliland.)

A. The 26th day of November, 1955? No, I do not. What happened?

Q. Do you recall having a conversation with a Mr. John Anson on the 26th day of November, 1955?

A. I do not remember.

Q. Do you recall having a conversation with a Blanch Lampert in November 1955?

A. I do not remember what date.

Q. Do you recall having a conversation with her? [18]

A. Yes.

Q. Would it improve your memory if I told you that this conversation was November 2, 1955?

A. I wouldn't remember dates.

Q. Where were you when you conferred with Mrs. Blanch Lampert?

A. In Scottsdale, Arizona.

Q. And what was the reason for conferring with her?

A. I think my attorneys came down for some depositions.

Q. What was the purpose of the depositions?

A. For my divorce.

Q. Did you talk to Mrs. Blanch Lampert in regard to taking her deposition on a divorce prior to November 2, 1955?

A. I did not.

Q. You never spoke to her before you took the deposition?

A. No. My attorneys did.

Q. Your attorneys spoke to her before then?

A. I do not know.

Q. But you never spoke to her?

A. No.

(Testimony of Elsinore Machris Gilliland.)

Q. Were you present in the room when the deposition was taken? A. Yes.

Q. And you heard her testimony? [19]

A. Yes.

Q. Can you recall in substance her testimony?

A. I think it is all down there in black and white. You can read it.

Q. Do you recall what her testimony was, Mrs. Gilliland? A. Yes.

Q. What was her testimony?

A. Well, she told me about two women who visited at Mr. Gilliland's home.

Q. Had been what?

A. Had been visiting at Mr. Gilliland's home in Scottsdale. I did not know about the women beforehand. I didn't know what their names or what they looked like.

Q. And what did she tell you about the two women visiting at Mr. Gilliland's home in Scottsdale?

A. That they stayed there. I believe that one woman stayed there for several weeks as a guest, and the other one came in. She was living at some motel in the neighborhood.

Q. Who was living at some motel?

A. Miss Faye Lyons was living at a motel in the neighborhood.

Q. And that is what Mrs. Lampert told you?

A. Right.

Q. Did she tell you anything else? [20]

A. No, not very much. It seems one morning

(Testimony of Elsinore Machris Gilliland.)

early I called up Mr. Gilliland and some woman answered the phone.

Q. Do you recall that?

A. I recall that I called up Mr. Gilliland early one morning and this woman said, "My God, it's your wife." And she got hysterical on the phone. And I had to wait several minutes before Mrs. Lampert answered the phone. They called her to the phone to answer it.

That is all I know. The woman was hysterical when she answered it.

Q. Was Mrs. Lampert in the house?

A. Mrs. Lampert lived on the place. I believe she got their breakfast. I do not know.

Q. She was the—— A. Housekeeper.

Q. ——housekeeper, and her husband lived on the place? A. Right.

The Court: Let's move this along, Mr. Hughes. It is hard to keep my mind on it, you are so slow.

Q. (By Mr. Hughes): Did Mrs. Lampert say anything to you that Faye Lyons or Ann Meyers had committed adultery with Ray Gilliland?

A. She spoke to my attorneys, not to me. My attorneys took the depositions. I didn't.

Q. Did you ever have any information other than that [21] which you got from Blanch Lampert that there was adultery committed?

A. No—yes, I did. I beg your pardon. Mr. Gilliland told me he went to Florida and had two women down there that he——

(Testimony of Elsinore Machris Gilliland.)

Q. One moment, please. When did he tell you this?

A. Before we were married. And then he told me so afterward in San Francisco.

Q. He told you before you were married that he went to Florida?

A. Yes. There were two women down there he had been intimate with.

Q. One moment, please. Please try to answer the question. A. Yes, sir.

Q. He told you before you were married that he had gone to Florida and seen two people, two women, is that correct? A. Yes.

Q. When you took this deposition of Blanch Lampert, did you ever talk to her again from November 2, 1955, to November 26, 1955?

A. No, I did not. My attorneys advised me against it.

Q. And you never talked to her before November the 2nd? [22] A. No.

Q. Now, you didn't call her up and ask her to testify, to have this deposition taken? A. No.

Q. Was there anything in the deposition of Blanch Lampert that made you think that Ray Gilliland committed adultery with the two named women?

Mr. Murphey: I am going to object to that as being incompetent, irrelevant and immaterial; not the best evidence.

Mr. Hughes: If your Honor please, this woman has signed a complaint in which she charges these

(Testimony of Elsinore Machris Gilliland.)

women with adultery. The basis of that complaint is the fact that she was present when they took the deposition of this woman Blanch Lampert, and one of the——

The Court: What is the question, Mr. Reporter?

(Question read.)

The Court: Overruled. You may answer.

Q. (By Mr. Hughes): Could you answer that last question, Mrs. Gilliland?

The Court: You mean anything in the deposition itself?

Mr. Hughes: Yes, your Honor.

Q. Were you told anything? [23]

The Court: No. That isn't your question. You mean did she hear anything?

Mr. Hughes: Did you hear anything, Mrs. Gilliland?

The Court: In connection with the taking of the deposition——

Mr. Hughes: Yes, your Honor.

The Court: ——that caused her to believe that?

Mr. Hughes: Yes, your Honor.

The Court: You may answer.

The Witness: Well, I believe that Mrs. Lampert said Mr. Gilliland would go into her room, into the bedroom, in his shorts, and Mrs. Meyers would be in her slip; very much without any clothes on, with just a slip.

I bear no malice against these people, not any whatsoever.

(Testimony of Elsinore Machris Gilliland.)

Q. (By Mr. Hughes): Mrs. Gilliland, did she say anything about Faye Lyons?

A. She said Faye Lyons would come down to the apartment, or down to his house, at 3:00 or 4:00 in the afternoon, and they would drink and she would leave at 4:00 or 5:00 in the morning—while Mrs. Lampert was babysitting with her little boy.

Q. And that is what this Blanch Lampert told you? A. Yes. [24]

Q. At no time did you receive any information from anyone other than Blanch Lampert?

A. Mr. Gilliland told me that Faye Lyons had visited with him at his home in Oregon previous to our marriage. She was a guest of his in Oregon at his cabin up there.

Q. Did you have any other information other than this deposition?

A. No, just what Mr. Gilliland, my husband—

Q. Just what Mr. Gilliland said?

A. Right.

Q. And just what Mrs. Lampert told you.

A. No, he didn't say just what Mrs. Lampert told you. Mrs. Lampert said that—

The Court: I think you misunderstood the question. The question was—

If you stand behind that lectern there we can hear you better, Mr. Hughes. There is an amplifier there and it is there for a purpose.

The question is, as I understood it, did you have any other information except what you heard at

(Testimony of Elsinore Machris Gilliland.)

that deposition and what your husband told you?

The Witness: No, I did not.

Q. (By Mr. Hughes): Do you recall where you were on the 14th day of February, 1956? [25]

A. No. I may have been in Scottsdale. I do not know.

Q. Do you recall a conversation with Patti Karger, Mr. and Mrs. Kerwin, and Mr. Turbeville on that day?

Mr. Murphey: Your Honor, I object to that as being incompetent, irrelevant and immaterial; outside the issues as framed. I direct the court's attention to paragraph V (a) (3). None of those persons are named.

The Court: The pretrial conference order?

Mr. Murphey: Yes, your Honor.

The Court: What do you say to that, Mr. Hughes?

Mr. Murphey: The pretrial conference order I am referring to is in the Lyons case, page 7, paragraph V (a) (3).

Mr. Hughes: May I reframe the question, your Honor?

The Court: You may.

Q. (By Mr. Hughes): Do you recall a conversation on February 14, 1956, in the presence of Mr. Turbeville, Mr. Carpenter and Mr. Phil Kent?

A. I have never spoken to Mr. Turbeville for years. Phil Kent, I never spoke about the case. I never did to Mr. Kerwin. On my attorney's advice, we never spoke about a case.

(Testimony of Elsinore Machris Gilliland.)

Q. On May 15, 1956, at Scottsdale, Arizona, did you have a conversation with Ida Barr, Frank Kerwin, Rita Kerwin or Patti Karger?

A. No, I did not. [26]

Mr. Murphey: Just a minute. I will object to this as being incompetent, irrelevant and immaterial, unless it is directed to the subject matter which is set forth in the pretrial order. We are not getting anywhere to ask if she had a conversation unless the subject matter is identified, your Honor.

The Court: Sustained.

Mr. Hughes: If they have no conversation——

The Court: You are supposed to be cross examining this woman, I take it.

Mr. Hughes: Yes, your Honor.

The Court: Why don't you ask her leading questions and let's get on with this case. You haven't broached the subject as to what it is all about yet, that I know of. Or I have missed it because it is so long between questions. I am thinking about something else by the time you get around to the next question. Let's move this case.

Mr. Hughes: All right, your Honor.

The Court: Isn't it a fact that you said so and so in the presence of so and so at such and such a time? Let's move on. If that is what you are driving at.

Mr. Hughes: Yes, your Honor.

Q. Isn't it a fact that you said, "Ray shackled

(Testimony of Elsinore Machris Gilliland.)

up with Faye Lyons" on February 14, 1956, in the presence of Mr. Carpenter? [27]

A. No, I never said. I didn't even know what "shacked up" meant. I never heard that expression in my life until I read it in their complaint.

Q. Isn't it a fact that you said on May 15th at Scottsdale, Arizona, in the presence of the Kerwins, Karger and Barr that "Ray shacked up with Faye Lyons"? A. No.

Q. Isn't it a fact that on March 26, 1956, at Phoenix, Arizona, in the presence of Ida Barr you said, "Ray shacked up with Faye Lyons"?

A. No.

Q. It isn't it a fact that on December 20th or 21st, 1955, at the Mission Inn in Riverside, California, you said that, "Ray is being punished for sleeping with that Meyers person"?

A. No. I did not even know the Meyers person. I never even heard the name.

Q. Isn't it a fact that you said this too, in substance, in regard to the Lyons person?

A. No. I never heard their names.

Q. Isn't it a fact, Mrs. Gilliland, that you had no information other than the information given to you by Blanch Lampert when you accused these women in the complaint filed for divorce?

A. That's right, with the exception—— [28]

Mr. Murphey: Objection.

The Court: Just a moment. Let the witness answer.

Mr. Murphey: All right.

(Testimony of Elsinore Machris Gilliland.)

The Witness: With the exception of the neighbors in Scottsdale. All of the neighbors told me about women playing around the yard.

The Court: Do you want to include your husband, also, what he told you?

The Witness: He told me that he had Miss Faye Lyons up at his ranch in Oregon. And then, also, I saw a picture of he and Miss Meyers on a tree in my yard in Scottsdale. They had been in my pool. That is all I ever saw.

Q. (By Mr. Hughes): You saw a picture of——

A. A photograph, a camera snapshot of Mrs. Meyers and my husband.

Q. Where was that?

A. In his scrapbook in Scottsdale.

Q. When did you see that?

A. The last time I was down there.

Q. When was that?

A. That was last—the spring—well, just before he died. We had become reconciled the day after our divorce.

The Court: When did he die? [29]

The Witness: He died January 30th, I believe, 1956.

Q. (By Mr. Hughes): Isn't it a fact that he died January 30, 1957?

A. '57, was it? I don't know dates. '57.

Q. Isn't it a fact that you had a final decree—you had an interlocutory decree of divorce in the matter of Elsinore Gilliland vs. George Chester

(Testimony of Elsinore Machris Gilliland.)

Ray Gilliland, No. 62839 in the County of Riverside?

A. He tried to divorce me, but the judge gave me the divorce—the interlocutory. But I made up with him the day after. He called me up and begged me to come down to Scottsdale.

Q. You made up with him the day after the divorce?

A. Right. I went down to Scottsdale and we became reconciled. And we were reconciled until the time he died.

Q. You were reconciled with him until the time—— A. Right.

Q. *When* did you reside then from June 13, 1956, to January 30, 1957?

A. I lived both in Palm Springs and Scottsdale.

Q. Isn't it a fact that Ray Gilliland resided in Scottsdale, Arizona, from June 13, 1956, to January 30, 1957? A. Yes, sir.

Q. And that he lived separate and apart from you? [30] A. Yes, sir.

Q. Upon what fact do you base this reconciliation?

Mr. Murphey: I object as being incompetent, irrelevant and immaterial.

The Court: Are we going to try the Gilliland divorce case, too?

Mr. Hughes: No, your Honor.

The Court: What possible——

(Testimony of Elsinore Machris Gilliland.)

Mr. Hughes: I withdraw the question, your Honor.

Q. Isn't it a fact that you never served Faye Lyons and Ann Meyers in the divorce proceedings No. 62839 in Riverside?

A. I don't understand.

Q. You never served service of process on Faye Lyons or Ann Meyers?

The Court: Hasn't that been covered up to now by a stipulation, gentlemen?

Mr. Hughes: Well, it has in some respects.

The Court: Can it be covered by stipulation?

Mr. Hughes: I would like to inquire——

The Court: Were the *correspondence* served in the divorce action?

Mr. Murphey: They were not served, after a diligent search for them.

The Court: All right. Do you accept the stipulation? [31]

Mr. Hughes: I accept the stipulation that they were not served.

The Court: Very well.

Q. (By Mr. Hughes): What diligence, if any, did you use in endeavoring to serve the named correspondence?

The Court: That means did you try to serve them?

The Witness: I do not know whether my attorneys did or not.

Q. (By Mr. Hughes): You yourself did nothing? A. No.

(Testimony of Elsinore Machris Gilliland.)

Q. What, if anything, did you do with your second cause of action pled in that divorce complaint?

Mr. Murphey: I am willing to offer a stipulation, if you don't consider it an unfair interruption, that it is still pending in Riverside County. Nothing has been done with it.

The Court: Do you accept the stipulation?

Mr. Hughes: Yes, your Honor.

Q. What, if anything, did you do with the first cause of action?

Mr. Murphey: Another stipulation: She obtained the interlocutory decree on the first cause of action—mental cruelty. [32]

The Court: Do you accept the stipulation?

Mr. Hughes: Yes, your Honor.

Q. When did you see this picture of Ann Meyers and Ray Gilliland?

A. Last January just before he died. He showed me his scrapbook and told me it was Ann Meyers.

Q. Were you interviewed by the press?

A. No.

Mr. Murphey: Just a minute, please.

The Court: It is answered.

Mr. Murphey: It is so fast, your Honor, I can't possibly get an objection in.

Q. (By Mr. Hughes): Did you read the Daily Enterprise News of Riverside County on March 23, 1956? A. I believe I did.

Mr. Murphey: I am willing to offer a stipulation at this time, in the interest of time, that the

(Testimony of Elsinore Machris Gilliland.)

document which counsel has shown me is the first page of the issue of the Riverside Enterprise for the date of March 23, 1956.

The Court: Do you accept the stipulation?

Mr. Hughes: Yes, your Honor.

The Court: Do you offer it in evidence?

Mr. Hughes: Yes, your Honor. [33]

The Court: It will be received in evidence as Exhibit 4 in the Lyons case and Exhibit 3 in the Meyers case.

(The page referred to was marked Plaintiff Lyons' Exhibit 4 and Plaintiff Meyers' Exhibit 3, and was received in evidence.)

Q. (By Mr. Hughes): Do you subscribe to the Riverside Daily Enterprise? A. I do not.

Q. Did you see it on the newsstand?

A. I went and bought one.

Q. Off the newsstand?

A. I believe so.

Q. Did you ever talk to a reporter from the Riverside Daily Enterprise?

A. I said "Good morning."

Mr. Murphey: Just a moment, please. May I ask the court to request the witness to refrain from answering so fast? It is impossible to interject objections.

The Court: You heard what your counsel said.

Mr. Murphey: I object to the question as incompetent, irrelevant and immaterial, and no time stated before or after this alleged publication.

The Court: Isn't the answer in?

(Testimony of Elsinore Machris Gilliland.)

Mr. Murphey: I move to strike it for the purpose.

The Court: What was the answer?

(Answer read.) [34]

The Court: Do you wish to strike that?

Mr. Murphey: No, your Honor. I couldn't hear it over my objection.

The Court: Let's proceed, Mr. Hughes.

Q. (By Mr. Hughes): You never talked to any of them then? A. No, sir.

Mr. Murphey: Now, just a minute.

The Court: Do you mean at any time in her life?

Mr. Hughes: No, your Honor.

The Court: Well, why don't you be specific in your questions?

Q. (By Mr. Hughes): Did you ever talk to any reporter in regard to the March 23rd publication of the Riverside Daily Enterprise?

Mr. Murphey: You mean before, counsel?

Mr. Hughes: Before.

The Court: Before it was published?

Mr. Hughes: Yes, your Honor.

The Witness: No, sir.

The Court: Your answer?

The Witness: No, sir.

Q. (By Mr. Hughes): Were you ever interviewed by a reporter in regard to this cause of action you had pending for a divorce? [35]

Mr. Murphey: Just a moment. I object to that as being incompetent, irrelevant and immaterial,

(Testimony of Elsinore Machris Gilliland.)

and outside of any issue in this case. The third cause of action deals specifically with this publication.

The Court: Sustained.

If you want to be more specific in your question, I will allow it.

Q. (By Mr. Hughes): Isn't it true that you sought publicity in regard to your divorce action?

Mr. Murphey: Just a moment. The same objection, if the court please.

The Court: Overruled. You may answer. Newspaper publicity?

Mr. Hughes: Newspaper publicity.

The Witness: What was the question?

Q. (By Mr. Hughes): Isn't it true that you sought newspaper publicity in regard to your divorce action?

A. No, sir. I never sought any newspaper publicity.

Q. Isn't it true that you thought your public must be kept informed?

Mr. Murphey: Now, just a moment. I object to that as being incompetent, irrelevant and immaterial.

The Court: Do you mean whether she thought it or said it? [36]

Mr. Hughes: Said it, your Honor.

The Court: Why don't you ask her? What are you trying to do, lay the foundation for impeachment?

Mr. Hughes: Yes, your Honor.

(Testimony of Elsinore Machris Gilliland.)

The Court: Very well. If you amend the question, it will be allowed.

Mr. Anson: Your Honor, could I point out that in the pretrial conference order on the third cause of action, on page 8, the first issue is did the defendant cause this publication to be made, and only in the event that is established are these corollary issues as to whether she sought publicity and sought interviews to be reached in this case?

The Court: This is cross examination of the witness, I take it, and counsel states that he is attempting to lay a foundation for impeachment. So that would be admissible.

Was the question answered?

Mr. Hughes: Isn't it true that——

Mr. Reporter, will you read the question?

The Court: I think you better reframe it. I think you have asked her two or three questions about the question since then.

Q. (By Mr. Hughes): Isn't it true that—— [37]

The Court: On or about a certain time you said to so and so—is that it?

Mr. Hughes: Yes.

Q. ——on or about April 15, 1955, you stated that your "public must be kept informed"?

The Court: Stated to whom?

Q. (By Mr. Hughes): You stated in a deposition in action No. 82973 that your "public must be kept informed"?

The Witness: Shall I answer?

The Court: Yes.

(Testimony of Elsinore Machris Gilliland.)

The Witness: All right. I probably stated that my public wanted a clean report on me. My public is—I do a great deal of charity work, and I want no scandals. And when the deposition was taken it was taken in Riverside by Mr. Philip Barnett, and that was the only time I ever said it, and it was done facetiously.

Q. (By Mr. Hughes): Isn't it true that the first thing you do in a case of any out-of-order event in your life is call the press?

Mr. Murphey: I object to that as being incompetent, irrelevant and immaterial; outside of any issues in this case.

The Court: Overruled. You may answer.

The Witness: No, I do not call the press. I happen to be a member of all the press clubs in America, an honorary member. The press try to consult me, but I do not call the press. [38] And I do not give any information to the press, on my counsel's advice.

Q. (By Mr. Hughes): How long have you belonged to all the press clubs in America?

A. Not all of them in America. I am an honorary member of the Los Angeles Press Club, the Palm Springs Press Club. I belong to the Phoenix Press Club. Naturally, I have entree to all the press clubs in America.

Q. Isn't it true that you stated that you would give your life story to Confidential?

Mr. Murphey: Just a minute. I object to that as being incompetent, irrelevant and immaterial.

(Testimony of Elsinore Machris Gilliland.)

The Court: Do you wish to be more specific and say when and where, or give the witness any indication of what you have in mind? Or do you mean to ask her if she said that at any time, any place, under any circumstance?

Q. (By Mr. Hughes): Did you say that in regard to your divorce action? A. No.

Q. Did you ever state that you were going to give your story to Confidential? A. No.

Mr. Murphey: Just a moment. [39]

Q. (By Mr. Hughes): Isn't it true that you were in the dining room of the Phil Kent house on or about May 1, 1955, when Mr. Gilliland and Mr. and Mrs. Kent and Mr. and Mrs. Raleigh and their daughter and Faye Lyons were present?

Mr. Murphey: Just a moment. I object to that as being incompetent, irrelevant and immaterial, and having no bearing on any issue in this case; outside of any date named in the pretrial order, and there is no allegation that she is claimed to have made any derogatory statement concerning these women on that date.

Mr. Hughes: She has testified, your Honor, that she never knew these people, and I wish to introduce the fact that she did know them as well at the time that she made the various statements alleged in the complaint.

The Court: Which people are you speaking of?

Mr. Hughes: Faye Lyons——

The Court: She never knew the plaintiffs?

(Testimony of Elsinore Machris Gilliland.)

Mr. Hughes: She claims she never knew the plaintiffs.

The Court: At what time? She said she didn't know the names of these women who allegedly had been at her husband's place. But be more specific about the time. I don't recall that she said she never knew who these people were, these women were at any time. [40]

Q. (By Mr. Hughes): Did you ever know the woman Faye Lyons or Ann Meyers prior to November 26, 1955?

A. No. I don't even know them now.

Q. Isn't it true that you were in the dining room of the Phil Kent home in Scottsdale, Arizona, when present were Mr. and Mrs. Kent, Ray Gilliland, Mr. and Mrs. Raleigh and their daughter, and Faye Lyons?

A. I do not remember who was there. They were all sitting down and having dinner. I saw Ray's car out in front and I went in to call on the Kents.

Q. And they were all sitting there having dinner when you came in?

A. And then they all got up and walked out because I came in.

Q. Was this on or about May 1, 1955?

A. I cannot remember the date. It was on a Sunday evening.

Q. Isn't it true that Mr. Gilliland was sick and had had his illness diagnosed as cancer of the throat in January 1955?

(Testimony of Elsinore Machris Gilliland.)

Mr. Murphy: Just a moment. I object to that as being incompetent, irrelevant and immaterial.

The Court: What does it have to do with the case?

Mr. Hughes: I am building up to this, your Honor, [41] that she knew of this illness and she knew of these other factors.

The Court: Well, Mr. Hughes, it would be a great deal easier if you would prove your case in an orderly fashion. You are trying to show some malice here before you have ever offered any evidence that anything was ever said, except the divorce complaint.

The objection is overruled. You may answer.

You mean, does she know that?

Mr. Hughes: Yes, your Honor.

The Court: That is what you want to show, I take it, not that it was true, but that that was her understanding.

The Witness: In January '55, was that the year that Ray went to the hospital for the first time?

Q. (By Mr. Hughes): Yes, Mrs. Gilliland.

A. Well, I thought he had cancer. We couldn't tell him he had cancer. He wouldn't have believed us. I did not see Mr. Gilliland for months. I don't believe I saw Mr. Gilliland for eight or nine months after that, until the fall—after his first operation.

Q. I am speaking of prior to the operation, Mrs. Gilliland.

A. Prior to the operation? I sent him to a [42] hospital in Truckee and we had X-rays taken and

(Testimony of Elsinore Machris Gilliland.)

they thought they showed some spots, and they thought it was cancer. And they said, "Hurry him in to Los Angeles."

I called up five eminent physicians and surgeons for consultations, and he wouldn't have them. He said, "The goddam Jews. I will not have them."

So he went to some quacks and it pacified him. That is all I know. So I didn't know who was right, whether the surgeons, or his X-rays showed up correctly, or not. I was not sure.

Q. Did Mr. Gilliland drink quite a bit of whisky?

A. Yes, he did consume a great deal of whisky.

Q. Did he get drunk about every night?

Mr. Murphey: Now, just a moment. I object to that as being incompetent, irrelevant and immaterial.

The Court: What does it have to do with it?

Mr. Hughes: The question here is whether or not she had reason to believe whether he was capable of committing an act of adultery. Under Civil Code Section 47, subsection (2), State of California——

The Court: Is it your position that a man that is drunk cannot commit adultery?

Mr. Hughes: No, your Honor, it isn't. But when you take all the factors and put them together, he cannot.

The Court: You mean it is hardly likely. [43]
Overruled.

Did he get drunk nearly every night?

(Testimony of Elsinore Machris Gilliland.)

The Witness: No, not every night. He was periodical. He would drink and then he wouldn't drink.

The Court: Was he what you would call an alcoholic?

The Witness: Not exactly, no.

The Court: Just a heavy drinker?

The Witness: Just a heavy drinker.

Q. (By Mr. Hughes): To your knowledge, was he a heavy drinker for a long period of years?

A. I do not know. I did not know him for a good many years.

The Court: During all the time you knew him was he a heavy drinker?

The Witness: Quite heavy, yes.

The Court: How long did you know him?

The Witness: Well, I met him in '32, but we never were very great friends.

The Court: Your next question, Mr. Hughes?

Q. (By Mr. Hughes): Mrs. Gilliland, did you ever have an act of sexual intercourse with Ray C. Gilliland?

Mr. Murphey: Just a minute. I object to that as being incompetent, irrelevant and immaterial.

Mr. Hughes: I will reframe the question, your Honor.

Q. Isn't it true, Mrs. Gilliland, you were married May 3, 1954, and that you had an interlocutory decree of divorce granted you June 13, 1956, and in the intervening time you never had an act of sexual intercourse with Ray C. Gilliland?

Mr. Murphey: I object to that as being incom-

(Testimony of Elsinore Machris Gilliland.)

petent, irrelevant and immaterial, outside of any issue in this case.

The Court: Of course, if there had been evidence here it might be very good on rebuttal, if there was evidence claiming this was true. But all that is before the court now is the allegation of the cross complaint. Is that correct?

Mr. Hughes: Yes, your Honor.

The Court: As far as any claim of libel is concerned. Now, if you rested on that and the defense offered to prove that it was true, then in rebuttal it might be competent for you to show that he was incapable of it. And that is the purpose of the question, isn't it?

Mr. Hughes: Yes, sir.

The Court: I will sustain the objection at this time.

Is there anything further from this witness?

Mr. Hughes: I don't believe I have anything further of this witness, your Honor.

The Court: Anything further at this time?

Mr. Murphy: May I reserve my questions, because we will call her at a later date?

The Court: Very well. You may step down.

* * * * *

FAY LYONS

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Fay Lyons.

The Clerk: How do you spell your last name?

(Testimony of Fay Lyons.)

The Witness: L-y-o-n-s.

Mr. Murphey: If the court please, may I make an observation that this lady is not named as any witness having heard Mrs. Gilliland make any of the alleged oral statements; nor is she alleged to have any direct information [46] of any interview with the Riverside Enterprise. And I can only assume that she is going to testify concerning damages which may have resulted to her. And in the interest of orderly procedure I think it might be well for Mr. Hughes to establish his direct evidence of the acts before we go into the element of damages.

The Court: Is this lady one of the plaintiffs?

Mr. Hughes: Yes, your Honor.

The Court: I notice the name is spelled in the caption F-a-y-e.

Mr. Hughes: Yes, your Honor.

The Court: Do you wish to amend the pleadings?

Mr. Hughes: Yes, I do, your Honor. I wish to amend the pleadings to spell her name F-a-y.

The Court: The pleadings in complaint and pre-trial conference order and all proceedings will be so amended.

Mr. Murphey: Did the court rule on my suggestion?

The Court: I am waiting to hear from Mr. Hughes.

Mr. Hughes: If your Honor please, the plaintiff here, subject to orderly process, can testify as to when she first heard of these things, what she did,

(Testimony of Fay Lyons.)

if anything, about them, and her relationship, if any, with Ray C. Gilliland; that the gravamen of this action is the truth of these statements——

The Court : Is this offered on the second cause of action? [47]

Mr. Hughes: This is offered, your Honor, not only on the first cause of action but also on the second cause of action.

The Court: When do you expect to present evidence as to the first cause of action?

Mr. Hughes: I have some witnesses coming, your Honor. They are supposed to be here from Arizona, but I haven't been able to get hold of them.

The Court: Very well. You may proceed.

Direct Examination

Q. (By Mr. Hughes): Will you state your name, please? A. Fay Lyons.

Q. And you are the plaintiff in this action against Elsinore C. Machris Gilliland?

A. Yes.

Q. Were you acquainted with Ray C. Gilliland?

A. Yes.

Q. When did you first become acquainted with him? A. In 1937.

Q. Did you ever visit at his ranch in Oregon?

A. I did for one day with six or eight other people. I arrived there and returned alone the next day to Reno, where I was then living. [48]

Q. And that was in 1937? A. Yes.

(Testimony of Fay Lyons.)

Q. Did you see Mr. Gilliland in January 1954?

A. Yes, the first meeting after 13 or 14 years.

Q. Where was this? A. In Miami.

Q. Were you employed in Miami at that time?

A. Yes.

Q. What were you doing?

The Court: Miami, Florida?

The Witness: Yes, your Honor.

Q. (By Mr. Hughes): What were you doing?

A. I was employed at the L'Aiglon, which is a very nice restaurant, supper club.

What was I doing there? I don't understand the question.

Q. Were you hostess in the L'Aiglon restaurant?

A. Yes, partly.

Q. And reservation clerk? A. Yes, sir.

Q. And you also owned a concession there, is that right? A. Yes.

Q. Did you see Mr. Gilliland again in the year 1954? [49] A. No.

Q. When did you see him again?

A. In 1955.

Q. And when was that?

A. I believe the very early part of the year, January or February; soon after the New Year.

Q. Did you see him after January 1955?

A. Yes, in April.

Q. And where was that?

A. In Scottsdale, Arizona.

Q. Were you in Scottsdale, Arizona?

A. Yes.

(Testimony of Fay Lyons.)

Q. How did you come to be in Scottsdale, Arizona?

A. I made a trip to Scottsdale, Arizona for the purpose of looking at the development of the area with the thought of going into business there, either restaurant or motel business, and moving my family, my mother and son and I there, possibly.

Q. Did you see Mr. Gilliland in Scottsdale?

A. Yes.

Q. Where did you stay when you were in Scottsdale in April or the first of May, 1955?

A. At the Paradise Valley Guest Ranch.

Q. To your knowoledge where did Mr. Gilliland stay? A. In his home there. [50]

Q. On 71st Place? A. Yes.

Q. But not in the home of Mrs. Gilliland?

A. No, not to my knowledge.

Q. Did you meet Mrs. Gilliland while you were in Scottsdale? A. Yes.

Q. Where did you meet her?

A. At Mr. and Mrs. Kent's home.

Q. Was this a dinner party given by the Kents?

A. Yes, it was.

Q. During the time that you were in Scottsdale in April and May of 1955—what were the approximate dates of that time?

A. I think that I arrived there about the 23rd or 24th of April, and stayed for one week—either seven or eight days, rather. And then I returned home to Miami.

(Testimony of Fay Lyons.)

Q. During that time did Mr. Gilliland have guests in his house?

A. Just about constantly. I would say almost all the time every day.

Q. And who were the guests?

A. There were very many. Mr. and Mrs. Kerwin, Clyde Williams, Judge Fam and Mrs. Blake of Los Angeles, California. A Mr. Cliff Carpenter. Mr. Turbeville. Mr. and Mrs. Kent.

Q. Some of those guests stay in the house overnight?

A. Many of them did. Most of those people I mentioned, with the exception of the local people, Mr. Carpenter, Mr. Turbeville. When I arrived Judge and Mrs. Blake were house guests then. I met them the first day after I arrived.

Q. When did you leave Scottsdale on that trip?

A. I think that it was about May 2nd. It could have been the first of May. First or second.

Q. Did anyone accompany you when you left?

A. Yes. Mr. Gilliland. I had tried—I realized that I had to get home immediately. Dad was not well. He died the next month as a result of his——

Mr. Murphey: I am sorry, but I can't hear the witness.

The Court: Do you wish the answer read?

Mr. Murphey: Yes, I do, your Honor.

The Court: Please read it, Mr. Reporter.

(Answer read.)

Mr. Murphey: I move to strike the answer insofar as "I realized," as nonresponsive, and incom-

(Testimony of Fay Lyons.)

petent, irrelevant and immaterial to any issue in this case.

The Court: On the ground of immateriality, why, it will be stricken. [52]

Q. (By Mr. Hughes): Was anyone else with you on this trip besides Mr. Gilliland?

A. Mr. Clyde Williams part of the way.

Q. And how did you make the trip?

A. By automobile. We had to. Mr. Williams and Mr. Gilliland, the purpose of their trip was for them to look at some oil properties, and they offered to drive me to Ft. Worth, Texas, since I was unable to get a plane reservation out of Phoenix for Miami.

The suggestion was that I drive along with them to Ft. Worth where they were going, and I might have an easier time getting an airplane ticket from there, Ft. Worth, to Miami.

Mr. Gilliland and Mr. Williams did look at this one particular oil property on the way to Ft. Worth. I found it most interesting. And I think we took—

Mr. Murphey: Your Honor, I move to strike the portion of the answer that they did inspect oil property as having no bearing on any issue in this case. It's immaterial.

The Court: The motion is denied.

The Witness: Well, I am——

Mr. Murphey: May she answer questions, please, so I can interpose objections?

The Court: If she gives any portion of her

(Testimony of Fay Lyons.)

answer which you deem incompetent, irrelevant or immaterial, you [53] may move to strike that.

Q. (By Mr. Hughes): After you left Phoenix, can you tell me where, if any place, you stayed overnight?

A. I don't remember staying anywhere. I think we drove through.

Q. Did you visit the home of Clyde Williams and Judge Williams in Knoxville, Texas?

A. Yes.

Q. Did you stay there?

A. Yes. We stayed there for a few hours. We were—Clyde was rushing Ray to see this property. He kept saying that the time was of the essence, or he would lose the option on it. I mean, we didn't stay only but a few hours.

Q. You drove straight from Scottsdale to Knoxville, Texas?

A. I believe so. I think so.

Q. You don't recall staying anywhere?

A. I don't recall staying anywhere.

Q. After your visit in the afternoon at Clyde Williams' and Judge Williams' homes in Knoxville, Texas, did you go to Ft. Worth then?

A. It's Knox City.

Yes, then we went to Ft. Worth; stopping on the way.

Q. That is Knox City, Texas? [54]

A. Yes.

Q. And in Ft. Worth do you recall where you stayed, if any place?

(Testimony of Fay Lyons.)

A. The Hilton Hotel. It was, I think, in Ft. Worth.

Q. Did Mr. Gilliland and Mr. Williams conduct any business during the time you were in Ft. Worth?

A. Yes, they did. They would leave the hotel in the morning—we were there two days, I think—and they would be gone for several hours conducting business. They had meetings with one or two gentlemen there, I think, in reference to oil properties.

Q. Did all three of you have separate rooms in this hotel? A. Yes.

Q. Did you then go on to Miami, Florida?

A. Yes.

Q. And similar accommodations and such were used on your way to Miami, Florida?

A. Yes.

The Court: You mean by automobile?

Mr. Hughes: Yes, your Honor.

Q. (By Mr. Hughes): Was that by automobile, Mrs. Lyons? A. Yes.

Q. When was the approximate date that you arrived in [55] Miami, Florida?

A. I think that it was the evening—the day before Mother's Day, which I recall—I mean, I have that association. So that it probably was about the 9th or 10th of May, 1955.

Q. Did you then see Mr. Gilliland after you arrived in Miami, Florida?

A. We saw him the day we arrived. And he

(Testimony of Fay Lyons.)

came over—he dropped me off, visited with my family, and then left.

The next day he telephoned to say that he had to get back to Scottsdale, Arizona, and that he would drive by to say good-bye to us. Which he did. He visited the next day, and then left, he said, for the West—Arizona, I believe.

Q. Did you go again to Scottsdale, Arizona?

A. Yes.

Q. When was that?

A. Early in June, just after school closed. I took my son. I believe the 3rd of June, on or about the 3rd.

Q. How old was your son?

A. Six years old.

Q. And you took him with you? A. Yes.

Q. And what was the date of your arrival in Scottsdale, if you remember? [56]

A. I think June 3rd, 3rd or 4th.

Q. And where did you stay?

A. At the Paradise Valley Guest Ranch, the same place.

Q. What were your accommodations there?

A. We had a bedroom, living room, kitchen, breakfast room and bath.

Q. And who occupied the bedroom at the Paradise Valley Guest Ranch?

A. My son and I.

Q. Did you and Mr. Gilliland have any business during this period?

A. Yes. That was the purpose of the trip.

(Testimony of Fay Lyons.)

Q. What was the business?

A. During the first trip the business was interrupted, and so I came back later to complete it. I had seen several properties, several motels with Mr. Carpenter and Mr. Trubeville, who are in the real estate business. They had shown us some. We had met with an architect and gone over blueprints. That was for a restaurant which was being thought of, too, at the time.

And then I received a call—this was, of course, during the first trip—that my dad was ill and suffered a stroke. And at the same time Mr. Gilliland had been receiving telephone calls from Mr. Williams urging him to hurry and [57] meet him in Texas to see these oil properties or the wonderful opportunities, he thought, would be lost. So that that was the reason that I left and the reason that he left Scottsdale at that time, after my first trip or journey. My first trip.

Now, then, when I arrived home Dad was much, much better and he said, "Why don't you—I am fine, now. I am perfectly all right, and certainly well enough for you to return and finish what you had started in Arizona."

So that it was because of that that I was able to return. And, oh, probably ten days after I had arrived there I went back and did continue the pursuit of looking at motels again with Mr. Carpenter and Mr. Turbeville. And Mr. Kerwin and Mrs. Kerwin who were with us. And Mr. Gilliland. And so that I did continue.

(Testimony of Fay Lyons.)

Q. Now, Mr. Carpenter is a real estate man in Scottsdale, Arizona? A. Yes.

Q. And Mr. Turbeville was engaged in real estate business and around Phoenix, Arizona?

A. Yes.

Q. Did you see Mr. Gilliland every day during the time that you were there on the second trip?

A. No. He was out of town a good deal. And he was in town several days when I didn't see him, one reason [58] or another. And then after I arrived the second time, I decided to visit some friends in Los Angeles. And I took my son and a lady that I met there who was the babysitter for my child during both trips, the first and second, Alice Posky, I think her name was. And so Alice and Daniel, my son, and I drove from Scottsdale to Westwood and——

Mr. Murphey: Now, just a moment. I think the question has been answered as to whether she saw Mr. Gilliland. Also, this is incompetent, irrelevant and immaterial to any issue in this case.

The Court: Put your next question.

Q. (By Mr. Hughes): How long were you in Los Angeles?

A. We spent several days, five or six, I think, in Westwood. I had no idea where Mr. Gilliland was. He had left a few days before we left. And, well, that isn't—I guess I am speaking too much.

Q. Did you ever stay overnight in his house?

A. No.

(Testimony of Fay Lyons.)

Q. Was Mrs. Lampert at the house during the time you were there?

A. Mrs. Lampert worked for Walter Winchell. She told me—her husband told me. That was the understanding. They worked from early morning, I think, went for breakfast, [59] to serve Mrs. Winchell. I believe Blanche told me she didn't come to Mr. Gilliland's house until between 4:00 and 5:00 in the afternoon. Mr. Gilliland let them occupy a room that was not really connected with the house. It was—I think there was a carport in between. This is where they lived. I didn't get the feeling she was a housekeeper whatever. She cooked, I believe, once or twice while I was there. Mr. Gilliland cooked the time I was there, and Judge Blake and the others.

Mr. Murphey: May we have another question? This is incompetent, irrelevant and immaterial to any issue in this case.

The Court: Put your next question.

Q. (By Mr. Hughes): Was Mrs. Lampert in and out of the house at all times that she was there?

A. Oh, no. No.

Q. She had free access to the use of the kitchen?

A. Yes. For hers and her husband's food they had their separate little Frigidaire, yes.

Q. Did they stay in the kitchen and in the living room of the house?

A. No. They did in the kitchen. They would come, and Mrs. Lampert would fix something, some dinner for her husband.

(Testimony of Fay Lyons.)

The routine that I observed was that she would come about 4:30, give or take a half hour, and have her beer. She would go to the Frigidaire and take out—it was fascinating to me because I had never seen anybody literally—I am not exaggerating, line up——

Mr. Murphey: This is incompetent, irrelevant and immaterial, having no bearing on any issue in this case. I think we can get to some relevant question.

The Court: Put your next question.

Q. (By Mr. Hughes): After you came back from California—was that July 1955?

A. It could have been. I think it was the end of June when I came back from California.

Q. How long did you stay in Scottsdale after that?

A. Maybe ten days. But I can remember the date I left there. And it seems to me that I came back——

Q. Was Mr. Gilliland there during that ten days?

A. He was later. He wasn't there when we arrived. I brought a friend of mine back with me, and I remember we all discussing that we didn't know where Ray was.

Q. What was the name of your friend?

A. Beatrice Nemer Schor.

Q. Where did she stay?

A. She stayed in my apartment with my son and me.

(Testimony of Fay Lyons.)

Q. The three of you stayed in the apartment?

A. Yes. She stayed about a week. [61]

Q. Then you left and went back to Miami?

A. Yes.

Q. And in all this period of time you resided in Miami, Florida?

A. Oh, yes.

Q. From January 1954 through January 1956?

A. Yes.

The Court: Do you still reside there?

The Witness: Yes, your Honor.

Q. (By Mr. Hughes): Where did you first hear of the charges that you claimed in your complaint?

A. It was in L'Aiglon, where I worked. And one of our patrons said, "What is——"

The Court: Your next question.

Mr. Hughes, keep up with the witness, and we will get along better.

Q. (By Mr. Hughes): What was said by the patron?

Mr. Murphey: Just a minute. There has been no foundation laid.

Q. (By Mr. Hughes): Where is L'Aiglon?

A. It is in Miami.

Q. And what is it?

A. It is a very, very exclusive place for dining and for people meeting. There is no entertainment.

Q. What was the approximate date, if you can recall, [62] when you first heard of the accusations that were set forth in this matter?

(Testimony of Fay Lyons.)

A. I think it was in January. It seemed to me it was just shortly after the holidays, New Year's, in 1956. It may have been some weeks before or later.

Q. And how did you happen to hear of these accusations?

Mr. Murphey: Just a moment. What do you mean by "accusations"? I object to that as being incompetent, irrelevant and immaterial. We are talking about——

The Court: There are three causes of action here. Now, which one are you referring to?

Q. (By Mr. Hughes): How did you happen to hear of the matter set forth in your first cause of action?

A. People. Patrons. Mr. and Mrs. Young called ——

Q. Who are Mr. and Mrs. Young?

A. The proprietor of L'Aiglon at that time.

Q. How did you hear of the matters set forth in your second cause of action, which is the divorce complaint?

A. I received a letter with the clipping enclosed, a clipping which appeared in the Riverside newspaper from my friend who has lived here for many years. She sent it to me with a note asking me what this meant.

Mr. Murphey: I move to strike that as being incompetent, irrelevant and immaterial, hearsay, not the [63] best evidence—the content of any letter.

(Testimony of Fay Lyons.)

The Court: Motion denied. Proceed.

Q. (By Mr. Hughes): When did you first hear of the contents of the divorce complaint in the cross-complaint for divorce? When did you first hear about that?

A. In March. I think it was in the spring, March, or could have been early April in 1956.

Q. What action, if any, did you take in regard to this?

A. My first reaction was——

Q. What action did you take?

A. Before I contacted you?

Q. Yes.

A. I didn't take any action at first. I didn't know that there was anything that I could do. And I also recall that Mr. and Mrs. Gilliland had had so many litigation suits being brought and then dropped, and then continuing on this way, that it occurred to me that very likely this one would be dropped, too. And it happened during the busiest time of my career, and so I wasn't free to come to California or see about it. And I really didn't know there was anything I could do at that point. And I didn't think they would go into a divorce. I thought this suit would be dropped as so many, many others had been before.

Q. What effect did the matters set forth in the cross-complaint of divorce have on you?

A. It made me very, very nervous. Humiliation. The total disgrace of—the shock of suddenly being branded an adultress, a person unfit—it was——

(Testimony of Fay Lyons.)

Q. Were you under the care of a doctor?

A. I was under the care of a doctor. I had developed from nerve pressure—it was nerves and muscular pressure that settled in the head, the back of the neck, and spread until it paralyzed my right arm, which could not be used for many months. I couldn't hold my head up for more than ten minutes at one time. And then it was a collar, and later a towel that I used to pin very tightly around in order to keep erect for more than a few minutes at a time. I was under treatment for six——

Q. What effect did this have on your employment with the Youngs?

A. Mr. Young called me aside and said, "What are we going to do about this?"

And I said, "It will all be—I am sure it will be clarified, Mr. Young. It will take a little time."

My sister was planning marriage. She is a school teacher in the public school system in Dade County. She was going with a young man and they had plans for marriage. And she came to me one day—of course, at the time we were all living together and she was at home. She came home [65] one day and said that in school she had heard my name mentioned in this connection.

Mr. Murphey: Just a minute. I interpose an objection and move to strike the last statement concerning her sister.

The Court: Motion granted.

Mr. Hughes: If your Honor please, an element of damage in a slander or libel action——

(Testimony of Fay Lyons.)

The Court: It can't be proved by saying that somebody else said that they heard it.

The Witness: No.

The Court: Your question to the witness did not call for that.

Put your next question.

Q. (By Mr. Hughes): Was your family upset over this matter?

The Court: The question was, what happened to Young and her employment, as I take it, in Miami, Florida.

Did anything happen? I haven't heard the answer.

Q. (By Mr. Hughes): Are you still with the Youngs in Miami, Florida?

A. Yes. Pending the outcome of this, the final result of it, at least, anyway. They are that fair.

Q. What effect did this have on your family?

Mr. Murphey: Just a moment. Incompetent, irrelevant and immaterial.

Mr. Hughes: It is incompetent, irrelevant and immaterial, your Honor, if I try to insert that as an element of damage. But if I use the effect of her family and how that affected her——

The Court: Then why don't you just ask her. You have asked her how these things affected her and she said that she had been very ill, as I understand the testimony. You can ask her what happened to her, if you want to; not how it affected members of her family. That is immaterial. It is how it affected her that is material.

(Testimony of Fay Lyons.)

The Witness: I became more and more affected. There were so many, many reasons for this. To begin with my Mother's health hadn't been well. And as a result of this disgrace she became actually very, very ill. Her illness made me more upset.

Mr. Murphey: Just a moment. I move to strike the state of health of the mother as having no bearing on any issue in this case.

The Court: The motion is granted.

Your next question?

Q. (By Mr. Hughes): Did you attend the Lindsay Hopkins Vocational School?

A. Yes.

Q. From what date to what date? [67]

A. I returned from the second trip—

Q. What dates did you attend the school?

A. From August twenty something through October 29th, I believe.

Q. Would August 29, 1955 through October 23, 1955 refresh your memory? A. Yes.

Q. Were you ever absent from the school during that time? A. No.

Q. What was your course of study at that time?

A. Hotel cashiering operation.

Q. Why did you take a course in hotel cashiering?

Mr. Murphey: I object to that as being incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: That was my plan before my first trip to Scottsdale. I thought I would go there and see the country, and then with the purpose of going

(Testimony of Fay Lyons.)

into a hotel, investing in a hotel or maybe restaurant, or maybe both, and then return to Miami and take this course at the Lindsay Hopkins School, and that is what I did.

Q. (By Mr. Hughes): This was part of your plan, then, in regard to inspecting motel properties and hotel properties and restaurant properties, and it was that you wished to go [68] into that business, and that you then took up this course of study at the vocational school? A. Yes.

Mr. Murphey: That is highly leading and suggestive. I suggest counsel ask questions——

The Court: The answer may stand.

Put your next question.

Q. (By Mr. Hughes): Were you absent from that school at any time during the period?

A. No.

Q. And during that period, August 29, 1955 through October 23, 1955, you were always in Miami, Florida? A. Yes.

Q. Did you ever have sexual intercourse with Ray Gilliland? A. No.

Mr. Hughes: I have no further questions.

The Court: That concludes your examination?

Mr. Hughes: Yes, your Honor.

The Court: Any cross examination at this time?

Mr. Murphey: If I may reserve it, I think it would be in the interest of saving time, if the court please.

The Court: Very well. You may step down.

(Witness temporarily excused.)

* * * * *

BLANCHE LAMPERT

called as a witness on behalf of the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Blanche Lampert.

The Clerk: Will you spell your last name?

The Witness: L-a-m-p-e-r-t.

Direct Examination

Q. (By Mr. Hughes): Where do you now reside, Mrs. Lampert? A. Scottsdale.

Q. What is the address?

A. 3052 South Marshall.

Q. Are you employed? A. Yes.

Q. By whom are you employed?

A. The Walter Winchells.

Q. Did you ever reside at Ray Gilliland's house on 71st Place in Scottsdale, Arizona?

A. Yes. [72]

Q. And you occupied a portion of that house?

A. Yes.

Q. Was that you and your husband?

A. Yes, sir.

Q. And on what dates was that?

A. From May 1st until September 30th, only. From May 15 to June 15th we took our vacation.

Q. Were either you or your husband at that house most of the time during that summer when you weren't on vacation?

A. I would go up to Mrs. Winchell's—that is, when I first went there until I took my vacation I would go to Mrs. Winchell's at 10:00 o'clock in the morning and back at 4:00 in the evening, or

(Testimony of Blanche Lampert.)

in the afternoon, until I came back from my vacation.

Q. By reason of your residence in the Gilliland house did you have an opportunity to observe the visitors to that house in that period?

A. Sure.

Q. Will you tell us if any visitors were there on May 1, 1955?

A. Well, I can't recall the dates. I didn't keep track of the dates because I wasn't interested in them.

Q. Well, isn't May 1st when you moved into the Gilliland residence? A. Yes. [73]

Q. And was there anybody there at the time you moved in?

A. You mean staying there?

Q. Yes.

A. I don't remember if that is when Mr. and Mrs. Blake was there or not. It was right around the time Mr. and Mrs. Blake were staying there.

Q. Now, was anyone else there?

A. You mean staying there?

Q. Yes, ma'am.

A. There was no room for anyone else.

Q. Did Mr. Gilliland stay there?

A. Yes.

Q. Where did he sleep? Do you know?

A. On the porch.

Q. Where? A. On the porch.

Q. Was there anyone there on May 5th after the Blakes had left, we'll say?

(Testimony of Blanche Lampert.)

A. Staying there?

Q. Yes, ma'am.

A. I don't remember whether there was or not. There were so many going and coming. I don't remember whether there was or not on that date.

Q. Well, who came and stayed at the house after the [74] Blakes left, if anyone?

A. I don't think anyone did before we left on our vacation—stayed at the house.

Q. Wasn't Clyde Williams there?

A. Well, I don't know if that would be around that date or not. But Judge Williams, not Clyde.

Q. Isn't it true that Clyde Williams was there also?

A. I don't know Clyde Williams.

Q. Isn't it true that Frank Kerwin was there?

A. He didn't stay there.

Q. Do you know where the stayed?

A. No.

Q. Did Patti Karger ever come and stay there?

A. No.

Q. Where did she stay? Do you know?

A. No. One time she stayed up at the Paradise Valley Guest Ranch.

Q. That was when Mrs. Strong, a sister, was there?

A. Well, that was Ray's sister. I don't recollect that being her name, but it was Ray's sister.

Q. And when Mrs. Meyers was there and all three of them stayed up there.

A. Well, that was in August after I came back

(Testimony of Blanche Lampert.)

from my vacation. Either July or August. Probably July. It was after I came back from my vacation, anyway. [75]

Q. Did you see anything in the house that would lead you to believe that Faye Lyons committed adultery with Ray Gilliland?

Mr. Murphey: I object to that as calling for a conclusion of the witness and being incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Hughes): Well, what did you observe between the conduct of Ray Gilliland and Faye Lyons, if anything?

A. Well, she was down there, and they partied together. I mean they had drinks together. And they argued a little bit.

Q. In fact, all four of you, your husband and yourself and Ray and Faye Lyons sat in the kitchen and ate dinner, and such, didn't you?

A. We have, yes.

Q. What did you observe, if anything, in the conduct of Ray Gilliland and Ann Meyers?

A. Well, Ann Meyers lived there. And she would run around there in her slip and her bra. The morning that Mrs. Gilliland called and she answered the phone she did say, "My God, Ray, that's your wife." And he come atearring in the room. I don't know from which room or where. But they got dressed in a hurry and got out of there. [76]

Q. And where were you?

(Testimony of Blanche Lampert.)

A. Right there in the archway in the living room there. In fact, I hooked up—I don't remember what it was—something for Mrs. Meyers—whether it was her dress, or what it was. But I know I helped her with something.

Q. You were right there in the house?

A. Yes. I was getting—I just came in from our bedroom to get my husband's breakfast before he went to work. And the telephone rang and Mrs. Meyers answered. And when I came on the phone Central said, or Mrs. Gilliland said to me, "Who was that?"

And I said, "It must have been Central, or a cross-wire."

Q. Do you know where Mr. Gilliland slept while she was there?

The Court: While who was there?

Q. (By Mr. Hughes): Mrs. Meyers.

A. I don't know. I know they had a bed out on the porch, out on the—yes, out on the porch, a rollaway out there that was made up.

The Court: Were there two beds in the house?

The Witness: There was one bed in the bedroom and one out on the porch.

The Court: Were they double beds?

The Witness: Yes. [77]

The Court: Both of them?

The Witness: One was a double bed in the main bedroom, and one on the porch was a rollaway double bed.

Q. (By Mr. Hughes): And as far as you know,

(Testimony of Blanche Lampert.)

Mr. Gilliland occupied that rollaway double bed, did he?

A. I don't know where he slept.

Q. Did you go into the house and look around?

A. Sure. Well, I done the work there, changed the beds, and things.

Q. You changed the beds? A. Yes.

Q. What beds were used?

A. Both of them.

Q. When was the first time you ever met Elsinore Gilliland?

A. When I gave a deposition or statement, whatever you call it.

Q. That was the first time you ever met her?

A. I met her, just to meet her, the day that they took her deposition, some time when they were filing papers for divorce, or something. And they stopped in—Phil Barnett and a group of them stopped in at Ray's, and after the deposition—I was in the kitchen and Mrs. Gilliland told me then that there was some spots on that carpet of Ray's [78] that I should get some shampoo and get them out.

And that's the first time I met Mrs. Gilliland.

Q. Was that April 15, 1955?

A. No. I didn't go there until the 1st of May.

Q. Isn't it true that Mrs. Gilliland contacted you and requested that you give a statement on November 2, 1955?

A. Mr. Murphey contacted me.

Q. Isn't it true that on November 2, 1955, you told Mr. Murphey, in reply to the question of how

(Testimony of Blanche Lampert.)

often would Mr. Gilliland have guests at his home when Mrs. Gilliland wasn't around, were they ever alone that you know of, and you answered, "Sure. He had Faye Lyons from Miami; and I think he was a little scared to be alone. He acted like it. He was always going to have somebody come if there was no one there. There had been lots of guests there"?

Mr. Murphey: This is an improper attempt to impeach the witness. It is not the best evidence.

Mr. Hughes: It is not an attempt to impeach the witness.

The Court: What is the purpose of it?

Mr. Hughes: I just want to know if it is true that she said this.

The Court: Well, she is your own witness. Why don't you ask her if it is so? The important thing, unless you are attempting to impeach her, is whether it is true [79] and not whether she said it. She is testifying here.

Q. (By Mr. Hughes): Did you say that, Mrs. Lampert?

The Witness: Will you repeat the question, please?

The Court: The objection is sustained.

You may inquire as to the truth of those statements. I think she has testified to the fact, hasn't she?

Q. (By Mr. Hughes): Was November 2, 1955 the first time you ever talked to Mr. Murphey or Mrs. Gilliland?

(Testimony of Blanche Lampert.)

A. I talked to Mr. Murphey over the phone.

Q. And on that day they had a court reporter and took your statement on November 2, 1955?

A. I don't remember the date, what date. I don't know what date it was.

Q. Did you give Mrs. Gilliland any other statements besides the November 2, 1955 statement?

A. No, I don't think so. I gave several depositions at different times, but I don't—it wasn't for Mrs. Gilliland.

Q. Didn't she call you to give your deposition on May 10, 1956?

A. She never called me for anything.

Q. Just what did Mrs. Gilliland—or, what did you tell Mrs. Gilliland in regard to any of the relationship of [80] Faye Lyons and Ray Gilliland?

A. I told her that Faye Lyons stayed up at the Paradise Valley Guest Ranch, that she would come down there and stay until late in the night or early morning. She didn't live down there. And that I babysat for Faye Lyons the night they had the fuss, and Mr. Gilliland—

Q. One moment, please. You told her that?

A. Yes. And Mr. Gilliland slapped Faye and she threw a glass at him. And she came home. And he took the car away from her.

And Ann Meyers stayed right there at the house with Mr. Gilliland.

Q. And you were right in the house during all this time?

(Testimony of Blanche Lampert.)

A. When I wasn't in there cooking I was over in my own apartment, or my room over there. That was between the main house—where I stayed, and between the main house there was a double carport, room for two automobiles there.

Q. Now, what you have just related is everything you ever told Mrs. Gilliland in regard to this?

A. Only about—like I said, about her running around in her bra and her slip. And I saw Mr. Gilliland run around in just his pajama tops.

The Court: What do you mean by that? Do you mean without the pajama bottoms? [81]

The Witness: That's right.

Q. (By Mr. Hughes): And all of this you told Mrs. Gilliland?

A. Yes, I told her.

Q. Did you tell her before November 2nd or after November 2nd?

A. I don't recall that November 2nd date at all.

Q. Well, before Mr. Murphey took your statement or after?

A. When Mr. Murphey took my statement.

Q. And you never told Mrs. Gilliland that before and that was the only time after that?

A. I had it in the statement.

Mr. Murphey: If the court please, I will furnish counsel with the original of the sworn statement if he desires to use it.

The Court: Do you wish to offer it?

Mr. Hughes: Yes, your Honor.

(Testimony of Blanche Lampert.)

The Court: Place it in front of the witness, Mr. Clerk.

(Whereupon, the document was placed before the witness.)

The Court: Is that the statement you refer to?

The Witness: Yes.

The Court: Do you offer it in evidence? [82]

The Witness: I made it in the statement and Mrs. Gilliland was sitting there listening. And Mr. Murphey took my statement.

The Court: Is that the statement, Exhibit No. 8, which we just talked about here and identified?

The Witness: Yes, sir.

The Court: That fairly states the substance of what you told her?

The Witness: Yes.

Mr. Hughes: I have no further questions, your Honor.

The Court: Any cross examination of this witness?

Mr. Murphey: No questions.

Mr. Anson: Not at this time. We will reserve the right to call Mrs. Lampert later.

The Court: We will take the afternoon recess at this time.

(Short recess.)

The Court: Your next witness for plaintiff?

Mr. Hughes: I call Mr. Kerwin. [83]

* * * * *

BEATRICE NEMER SCHOR

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Beatrice Nemer Schor.

The Clerk: Will you spell it out, please?

The Witness: B-e-a-t-r-i-c-e N-e-m-e-r S-c-h-o-r.

Direct Examination

Q. (By Mr. Hughes): Mrs. Schor, are you acquainted with Fay Lyons?

A. Yes, I am.

Q. And she is this lady right back here (indicating)?

A. Yes.

Q. Did you know Fay Lyons in June of 1955?

A. I did. [119]

Q. How long have you known Fay Lyons?

A. 20 or 23 years.

Q. Did you see Mrs. Fay Lyons in June of 1955?

A. I did.

Q. Where did you see her?

A. Here in Los Angeles.

Q. Would that be June 18, 1955?

A. I think so.

Q. Was she here in Los Angeles any period of time from June 18th?

A. I would say several weeks.

Q. Would you say that she was here June 19th, the 20th, the 21st and 22nd?

A. I would.

Q. Did you and Miss Lyons then go to Scottsdale?

A. Yes.

Q. Did you stay in Scottsdale with Miss Lyons?

A. Yes. I was a guest in her home.

(Testimony of Beatrice Nemer Schor.)

Q. Where did you stay in Scottsdale?

A. At a hotel. I don't know the name of it.

Q. To refresh your recollection, would it be the Paradise Valley Guest Ranch? A. Yes.

Q. Did Miss Lyons have anybody with her besides you?

A. Yes, she had her child Danny. [120]

Q. When she was here in Los Angeles did she have anybody here with her?

A. Yes; here with her child.

Q. Anyone besides her child?

A. Yes. She had a nurse.

Q. Would you say Alice——

Mr. Murphey: Just a moment. I object to the leading question.

The Court: Sustained.

Q. (By Mr. Hughes): Were you a frequent visitor with Fay Lyons while she was here?

A. Yes, I saw her practically every day.

Q. Was Mr. Gilliland with her?

A. Oh, no. I didn't know him.

Q. When you were in Scottsdale did you see Mr. Gilliland? A. Just once.

Q. Were you with Miss Fay Lyons every day when she was in Scottsdale? A. Yes.

Q. Did you ever hear of the divorce action between Ray Gilliland and Elsinore Machris Gilliland? A. Yes, I did.

Q. How did you learn of it?

A. I read it in the newspaper. [121]

Q. And what did you read in the newspaper?

(Testimony of Beatrice Nemer Schor.)

A. That Miss Fay Lyons had been accused of adultery with a Mr. Gilliland.

Q. Approximately when was this?

A. In '55 or '56, I can't remember. It was back several years ago.

Mr. Murphey: I can't hear the witness.

The Court: Do you wish that read?

Mr. Murphey: Yes, please.

The Court: Read the last answer, Mr. Reporter.

(Answer read.)

Q. (By Mr. Hughes): Did you learn of it any other way?

A. Yes. After that clipping, Mr. Pomeranz, Miss Fay Lyons' former husband, came to Los Angeles.

Q. And? A. He visited me.

Q. Did he visit with you?

A. He came to my home.

Q. Did he comment on it?

Mr. Murphey: Now, just a minute. That is objected to as incompetent, irrelevant, and hearsay, and not the best evidence.

Mr. Hughes: If your Honor please——

The Court: Overruled. You may state whether or not he commented on it, but not what he said.

Q. (By Mr. Hughes): Did he comment on it?

A. He certainly did.

Q. What did he say?

Mr. Murphey: The same objection, if the court please.

Mr. Hughes: If your Honor please, it has to do with the element of damage here in that——

(Testimony of Beatrice Nemer Schor.)

The Court: You are offering it not for the truth of what he said, but just——

Mr. Hughes: No, your Honor.

The Court: ——the fact he said it.

Mr. Hughes: Yes.

The Court: It may be received for that limited purpose. Overruled.

Mr. Anson: May I be heard for one moment on that?

The Court: Yes.

Mr. Anson: This obviously goes to the third cause of action, the clipping in the Enterprise. There has been no showing whatever on the main issue involved that it was a publication caused by Mrs. Gilliland. For that reason it is irrelevant and immaterial.

The Court: The ruling will stand, gentlemen. You can't prove everything by one witness. You have to take it one at a time.

Q. (By Mr. Hughes): What, if anything, did Mr. Pomeranz [123] say to you?

A. Mr. Pomeranz said that Fay Lyons was not a fit mother to take care of her child, or to have her child in her custody, if she was named as an adultress. And this he said in the witness of several people in my own home who never met Fay and who didn't know this man.

Q. Did he threaten that he was going to take the child from Fay Lyons?

A. He certainly did. He told me that he was going to fly to Florida and remove the child from

(Testimony of Beatrice Nemer Schor.)

her custody, and I subsequently wrote her this asking her to be sure to watch Danny every minute of the day because he was threatening this in my home.

Mr. Hughes: I have no further questions.

Cross Examination

Q. (By Mr. Murphey): I understood you to testify that you saw Mr. Gilliland once. Where was this?

A. He and another gentleman came to the Paradise.

Q. When?

A. It was probably 11:00 o'clock in the morning; 10:00 or 11:00 o'clock in the morning.

Q. Who was the other gentleman?

A. I am sorry, I don't know. He was a local real [124] estate man. He was a local man; an elderly gentleman, if I remember.

I don't know any of these people. I didn't know him until that time.

Q. And you met Mr. Gilliland, I take it, in Fay Lyons' apartment at the Paradise Valley Guest Ranch?

A. It was outside at the Paradise. We were out at the pool.

Mr. Murphey: Nothing further.

The Court: Any redirect examination?

Mr. Hughes: None, your Honor.

The Court: You may step down.

* * * * *

Mr. Hughes: If your Honor please, the plaintiff will call Mrs. Ida Barr.

IDA MAE BARR

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Ida Mae Barr.

Mr. Murphey: If the court please, I rarely ever make a suggestion concerning an examination by opposing counsel of a witness. However, this witness's deposition has been taken, unless the subject matter of conversations is identified she just takes off on unrelated matters that have no bearing on any issue of this case.

I offer that as a very constructive suggestion, rather than have the evidence adduced that would be highly improper.

The Court: Lay the foundation as to time, place and persons present.

Mr. Hughes: I will try, your Honor.

Direct Examination

Q. (By Mr. Hughes): Mrs. Barr, are you, or were you acquainted with Ray Gilliland and Elsinore Gilliland? A. Yes, I was.

Q. What is your occupation?

A. I am a registered nurse.

Q. Did you tend Ray Gilliland?

A. Yes, I did.

Q. The first time you ever met Mr. Gilliland was after his first operation, is that right?

A. Yes, sir.

(Testimony of Ida Mae Barr.)

Mr. Murphey: Just a minute. Let's not lead the witness.

Mr. Hughes: I think I can expedite things, your Honor.

The Court: Proceed. Overruled.

Q. (By Mr. Hughes): Was it after his first operation? A. Yes, sir.

Q. When was that? Was that November 1955?

A. November the 3rd, I think, 1955.

Q. And in the month of November 1955 were you on duty every day that month?

A. Yes.

Q. In the month of December 1955 were you on duty every day? A. I think I was.

Q. And January?

A. I think I missed two days in January.

Q. And February and March were almost the same? A. Just about.

The Court: That would be 1956?

Mr. Hughes: 1956, your Honor.

Q. (By Mr. Hughes): Was that not 1956, Mrs. Barr? A. Yes.

Q. Did Mr. Gilliland have a second operation in June 1956? A. Yes. [127]

Q. And were you his nurse at that time?

A. Yes, sir, I was.

Q. And you were his nurse almost the full month of June 1956? A. Yes.

Q. And in July 1956 you were with him most of that month?

A. Yes, most of the month.

(Testimony of Ida Mae Barr.)

Q. During this time from November 3, 1955 up to and including the day of the death of Ray Gilliland, January 30, 1957, you did extra work for him now and then, is that right?

A. Yes, I did.

Q. He'd call you on the phone and you would go out to take care of him if he was in distress?

A. I certainly would. [128]

* * * * *

Q. Did Mrs. Gilliland ever make any comments as to your relationship with Mr. Gilliland?

A. Oh, yes.

Mr. Murphey: Just a moment. That is irrelevant and immaterial. And I move the answer be stricken for the purpose of the objection.

Mr. Hughes: One moment, your Honor. This is inserted here to show the circumstances under which these things were done, to prove malice in fact, that this woman didn't just pick on these two, Ann Meyer and Fay Lyons, but any woman who so much as said "good morning" to Mr. Gilliland was subject to her tirades.

The Court: Is jealousy malice?

Mr. Hughes: Your Honor, I think it is when it goes to the extreme of striking out and willfully trying to hurt anybody who has by reason of—

The Court: Well, you are begging the whole question when you say that. My question is this: If the fact that a woman is jealous of a husband being around other woman, is that relevant to the issue of malice? I never heard such an argument

(Testimony of Ida Mae Barr.)

before. If it is, why, there are a great many malicious people who don't consider themselves so.

Mr. Hughes: Jealousy, your Honor, I feel can be evidenced by a number—— [133]

The Court: Jealousy can prompt a great many things.

Mr. Hughes: And I think in this instance the jealousy prompted the malice in the hopes to hurt anyone who endeavored to associate with Mr. Gilliland. This just wasn't an instance of——

The Court: Very well. You may answer. The objection is overruled.

Q. (By Mr. Hughes): Did Mrs. Gilliland ever say anything to you in regard to your relationship with Mr. Gilliland?

A. Oh, yes, many times.

Q. Do you recall June 14th or 15th, 1956?

A. Yes.

Q. What, if anything, did she say to you on that date?

Mr. Murphey: Just a moment, if the court please. May our objection be deemed to run to this entire line of questioning?

The Court: Yes. And overruled.

Q. (By Mr. Hughes): What did she say to you on that date?

A. She said that she would have never gotten a divorce if it hadn't been for me.

The Court: Did she accuse you of shacking up with Mr. Gilliland?

The Witness: She was wrong if she did. [134]

(Testimony of Ida Mae Barr.)

The Court: I didn't ask you——

The Witness: I am good at giving wrong answers.

The Court: Did she accuse you of that?

The Witness: No.

Q. (By Mr. Hughes): Did she ever accuse you of sleeping with him?

A. Oh, yes, one occasion.

Q. In fact, one day he called you to come out and take care of Mr. Gilliland and——

Mr. Murphey: This is highly leading, your Honor.

The Court: Yes.

Mr. Hughes: I withdraw the statement, your Honor.

Q. (By Mr. Hughes): Do you recall Christmas 1956? A. Yes. I recall '56.

Q. Did you treat Mr. Gilliland around Christmas 1956? A. I did.

Q. Approximately what date was that?

A. It was Christmas Eve night that I went to his house.

Q. Christmas Eve night, or the day after Christmas, right in there, is that right?

A. Right in there. I can't remember.

Q. That was in answer to a call by him?

A. Yes. [135]

Q. Did he call you on the telephone?

A. Well, he couldn't talk. But we had signals that he would call up for me to come clean out his throat. He had a complete laryngectomy and I

(Testimony of Ida Mae Barr.)

used to have to clean it out so he could breathe. So, I told Mr. Gilliland that I wasn't very well but I'd be happy to come if it was an emergency. He said, "No, it can wait."

So the next day I went out.

Q. And you were with Mr. Gilliland the next day? A. Yes.

Q. And you talked as well as you could with him, and he with you?

A. Yes. He wasn't using his little "talkie." He was writing everything down.

Q. And did he discuss with you or tell you anything of his relationship with Ann Meyer or Faye Lyons or Elsinore Gilliland?

Mr. Murphey: Just a moment. That is objected to as incompetent, irrelevant and immaterial; outside of any issue in this case. The issues are framed by the pre-trial order.

The Court: What could be the purpose of that?

Mr. Hughes: Your Honor, the purpose of that is that we are laying a foundation for the evidence that Mr. Gilliland never had intercourse with Mrs. Gilliland. [136]

The Court: He can't testify in this manner, can he?

Mr. Hughes: That he can't.

The Court: You can't bring his testimony in in such a fashion.

Mr. Hughes: I think it is a declaration against interest if I ever heard of one.

Mr. Murphey: It's also hearsay, your Honor.

(Testimony of Ida Mae Barr.)

The Court: What kind of interest? Financial interest?

Mr. Hughes: Well, maybe we could put in that it was a declaration against a financial interest, too. I think I can lay the foundation for it. And if I don't tie it up, why, of course I am willing to withdraw it.

The Court: Very well. I will receive it subject to a motion to strike.

Mr. Hughes: Thank you, your Honor.

Q. (By Mr. Hughes): Mrs. Barr, what, if anything, did Mr. Gilliland tell you about his relationship with Ann Meyer, Fay Lyons and Mrs. Gilliland?

A. First, he wanted me to open Mrs. Gilliland's gift, Christmas gift to him. And I opened it. And it was a very beautiful gift. Mrs. Gilliland was always good to him.

And then I said, "I don't see why you two people [137] can't get along."

He said, "Well, Mrs. Gilliland has her good points; she has many. But—he says, "she is always accusing me of sleeping with you and Ann Meyer."

Q. And what did he then say, if anything?

A. And he said, "Some years ago I had surgery and I am unable for sexual relations with anybody."

Q. Did he tell you anything else?

A. That is all I remember.

Q. To refresh your recollection, did he tell you that he had told Mrs. Gilliland of this?

(Testimony of Ida Mae Barr.)

A. Oh, yes. And he says, "I told Mrs. Gilliland before I married her of this."

Mr. Hughes: I have no further questions.

Mr. Murphey: Just a moment. I move to strike her entire statement beginning with her statement, "I don't see why you can't get along," upon the grounds of the objection heretofore made; and under the Dead Man's rule, too, your Honor. I think it's highly prejudicial. I think it's taking us into an issue that is completely unnecessary.

Mr. Hughes: If your Honor please, Section 47 of the Civil Code of the State of California, subdivision (2) provides as set out in Mr. Murphey's memorandum; but it also states in Section 48 that malice will not be implied in subdivision (3) of Section 47; that if 47 is reviewed [138] there is under that phrase where there is a qualified privilege to include someone in a court proceeding. And we recognize it was a court proceeding in Riverside. We aren't denying that. But when it is a qualified privilege, the person who makes the allegations in the complaint must have a reasonable belief that such allegations are true. Furthermore, they must have been done without malice.

Now, I think we have shown a *prima facie* case of malice under this particular instance, and we have also shown a lack of a reasonable belief. And that is what her testimony is for. And that is what the testimony is for in regard to the man being ill, as well as in regard to the lack of being able to have sexual intercourse or being impotent.

(Testimony of Ida Mae Barr.)

And that is the theory of the second cause of action, and that's the reason for the deposition at the Visalia Municipal Hospital, and that's the reason for the testimony of the nurse that took care of him from November 1955 through January 30th, 1957.

The Court: Are you suggesting that if a man be impotent he can't have sexual intercourse, couldn't commit adultery?

Mr. Hughes: I am suggesting that if a man were impotent he could not commit adultery.

The Court: Perhaps I had better go back to the [139] dictionary.

Under one theory of that term you might prevail,—

Mr. Hughes: Your Honor, in support of my theory—

The Court: —as far as your definition is concerned it has medical basis.

Mr. Hughes: *People v. Breeding*, which is 19 Cal. Ap. 359—

Mr. Murphey: May I have that citation?

Mr. Hughes: 19 Cal. Ap. 359. The question in a criminal proceeding is that adultery must be shown beyond a reasonable doubt, but in order to substantiate the accusations in a civil proceeding it is necessary only that they show by a preponderance of the evidence. And anything that we take away from any possibility of preponderance of the evidence by reason of their testimony of possible opportunity, I think, cuts into any evidence

(Testimony of Ida Mae Barr.)

that they put there and discredits the fact that there is a preponderance of the evidence or ever will be.

The Court: Assuming all your theories are correct, upon what possible theory is this admissible from the lips of a man now dead?

Mr. Hughes: I don't think it's ever been ruled upon by a competent court, court of competent jurisdiction, whether or not a declaration that "I am unable to have sexual intercourse," is a declaration against interest. [140]

The Court: That exception to the hearsay rule deals with financial interest, doesn't it?

Mr. Hughes: Well, I think that it definitely was the grounds for divorce in this proceeding, and was used as such.

The Court: It was used as such?

Mr. Hughes: Yes, your Honor.

The Court: There is no such evidence here, is there. Perhaps you are wandering out of this record over into the divorce action.

Mr. Hughes: No, your Honor. I was going to try to wander into the annulment proceedings.

The Court: The records of those actions are not before me. I have no judicial knowledge of what those actions are.

Mr. Hughes: I am about to introduce those records.

The Court: Well, they are not here yet.

Mr. Hughes: I have to start somewhere, and I can't put it all in at once.

(Testimony of Ida Mae Barr.)

The Court: Assuming that the defendant here charged her husband with being impotent in a divorce action, that still wouldn't argue the admissibility of a declaration of a dying man, or a man now dead that he's unable to perform the sexual act.

That might be contrary to a great many interests, [141] but I don't see any financial interest involved.

The motion to strike will be granted. The evidence will remain in the record as a record of excluded evidence pursuant to Rule 43(c) if you so wish it.

Mr. Hughes: Does 43(c) allow me to bring this back in, your Honor?

The Court: It permits the evidence to remain as a part of the record so the appellate court can examine it and see whether or not I am correct in my ruling. It's a record of excluded evidence.

Mr. Hughes: Because I think I can tie it back up in here by subsequent witnesses.

The Court: Well, that still wouldn't, in my view, argue the admissibility of this. This man isn't here to be cross examined on it.

Mr. Hughes: All right. I have no further questions of this witness, your Honor.

Cross Examination

Q. (By Mr. Murphey): You recall, Mrs. Barr, that your deposition was taken at Phoenix, Arizona on January 24, 1958? A. Yes, I do.

Q. And it was taken by Mr. Coit Hughes?

(Testimony of Ida Mae Barr.)

A. Yes. [142]

Q. Now, you testified, did you not, at that time——

The Court: Just a moment. Do you expect this for impeachment purposes?

Mr. Murphey: Yes, sir.

The Court: Let's put the deposition before her. Is it here?

Mr. Murphey: The original is with the clerk.

The Court: Mr. Clerk, do you have it?

The Clerk: Yes, your Honor.

The Court: The clerk will place the deposition before her, and if you will tell her the page and line, and let her read it, and then put the question to her.

The Clerk: May I unseal this, your Honor?

The Court: Yes, you may unseal it. Unseal the deposition.

Have there been any defendant's exhibits marked?

Mr. Murphey: I do not believe so.

The Court: This will be marked Defendant's Exhibit A for identification, the deposition of the witness Barr.

(The exhibit referred to was marked Defendant's Exhibit A for identification.)

Q. (By Mr. Murphy): Now, before you examine that document, Mrs. Barr, you are absolutely sure that the occasion that you met Mrs. Gilliland in the lobby of the Mission Inn at Riverside was December 21st? [143]

(Testimony of Ida Mae Barr.)

A. I can't remember all those, but it was the day that we—Mr. Gilliland went to court at River-side to get his divorce.

Q. You are not sure what date that was?

A. No. But it seems like it was on the 21st?

Q. I ask you to look at page 5, line 14.

A. And read how far?

Mr. Murphey: And read to page 8, line 5, if you will, please.

The Court: Read all that to yourself, and then tell us when you are finished reading it, and then he will ask you a question about it, probably.

Are you finished?

The Witness: Well, I am finished with page 7. Do you want me to read more?

The Court: Read page 8. Down to line what?

Mr. Murphey: 5.

The Court: Have you finished?

The Witness: Not quite.

Yes, I finished, Mr. Murphey.

Q. (By Mr. Murphey): Now, you testified at that time, did you not, that you met Mrs. Gilliland in the lobby of the Mission Inn on the afternoon of December 21, 1955, did you not?

A. Yes. [144]

Q. And that you and she had a conversation alone, is that right?

A. Well, we were——

The Court: Did you so testify?

The Witness: Yes.

Q. (By Mr. Murphey): And you relate the con-

(Testimony of Ida Mae Barr.)

versation substantially this way: "Mrs. Gilliland—" exactly this way: "Mrs. Gilliland asked me how Mr. Gilliland was and I said that he was in very poor shape and I was sorry he had to make this trip and Mrs. Gilliland said—told me she had given Mr. Gilliland some money and that he didn't appreciate it and he took off over the country with women and he gambled the money and this was part of his pay. Now, she said—I can't remember the words but I know what she meant—he was getting repaid in other ways, in other words."

You so testified, did you not?

A. Yes, I did.

Q. You further testified that you didn't know what she meant about being repaid, did you not?

A. By Mrs. Gilliland not being repaid?

Q. That you didn't know what she meant by her statement that Ray was getting repaid.

The Court: The question is did you so testify?

The Witness: Yes. Thank you.

Q. (By Mr. Murphey): And you testified further, [145] in response to Mr. Hughes question, that you did not see her again that day, did you not?

A. Not to my knowledge.

Q. Or the next day, isn't that right?

A. That is—I testified to that, but I think I saw her in the courtroom. I wouldn't count that.

Q. Mr. Coit Hughes asked you, "Did she say that Ray is being punished for sleeping with Ann Meyer?"

And you answered, "She said that Ray was be-

(Testimony of Ida Mae Barr.)

ing punished for running around the country with the Meyers person and she didn't say whether Meyers was a woman or a man or anything."

Did you not so testify?

A. I did.

Q. Now, on that conversation I would like to have you examine page 17, line 7 to page 18, line 4. Will you please?

The Witness: I am ready.

Q. (By Mr. Murphey): Now, at the time of taking this deposition you testified, did you not, that this conversation at Riverside was in substance or effect that Ray was being punished for gambling, drinking and running around with women, did you not? A. Yes.

Q. And there was something said about retribution? [146] A. Yes.

Q. And you said yes, there was something said about retribution, is that not correct?

A. Mr. Gilliland—

Q. Didn't you testify that way? A. Yes.

Q. And I asked you this question: "That is all she said on that occasion, is that right?"

And you answered, "Yes." Isn't that correct?

A. That's right.

Q. Now, I ask you to examine page 8, line 14. I withdraw that.

I ask you to continue to examine, if you will, please, page 18, line 5 to page 19, line 26.

A. Yes. I am ready.

Q. And I asked you, did I not, as follows, com-

(Testimony of Ida Mae Barr.)

mencing at page 18, line 5: "And you never heard her mention the name of Ann Meyers with the exception of in March, 1956, isn't that right?"

"A. Mr. Murphey, I can't remember all those dates.

"Q. Well, that is the instance you have testified to when you were fixing up the scrap book and Mrs. Gilliland came up and saw a picture and tore it up? [147]

"A. I did not know whose picture it was.

"Q. And what she says was this, 'We had enough of Ann Meyers'?"

"A. Something to that effect.

"Q. But that is what you have testified to here?

"A. Yes.

"Q. And that is the substance of what she said?

"A. Yes, and I don't even know if it was Ann Meyers' picture.

"Q. Then the first time you heard of Ann Meyers was when you saw her picture in the Los Angeles paper, is that right?

"A. No, I heard of her. You see, well, she said, 'That Meyers person' at Riverside, but I didn't know if she was a woman or a man or anything.

"Q. She never named her first name?

"A. No, that is right, Mr. Murphey.

"Q. Now, the first time that you remember Mrs. Gilliland made any statement concerning Ann Meyers, mentioning her name, was after the divorce in June 1956, is that right?

"A. Yes, after the divorce.

(Testimony of Ida Mae Barr.)

“Q. And in substance she said that Ray had been running around with Ann Meyers and spending her money? [148] “A. Yes.

“Q. That is all?

“A. She named an amount of money.

“Q. But as far as Ann Meyers is concerned, that is all she said on that occasion?

“A. Yes.

“Q. That Ray had been running around with Ann Meyers? “A. Yes.”

You so testified, did you not?

A. Yes, I did.

Mr. Murphy: No further examination.

The Court: Any redirect?

Mr. Hughes: No, your Honor.

The Court: May this witness be excused?

Mr. Hughes: Yes.

The Court: You may step down. You are excused, Mrs. Barr.

The Witness: Thank you.

(Witness excused.) [149]

* * * * *

ELSINORE MACHRIS GILLILAND

called as a witness by the plaintiffs, having been previously sworn, resumed the stand and testified further as follows:

The Court: Please state your name, please.

The Witness: Mrs. Elsinore Machris Gilliland.

The Court: You have been sworn before?

The Witness: Yes, sir. Not this morning.

The Court: In this case.

(Testimony of Elsinore Machris Gilliland.)

The Witness: Yes, I have.

Mr. Hughes: If your Honor please, we've handed to the clerk pages 41 to 43 of a deposition given by Elsinore Machris Gilliland on April 15, 1955. Mrs. Gilliland, will you examine—— [150]

The Court: Marked Plaintiffs' Exhibit next in order for identification.

The Clerk: It will be Exhibit No. 6 in case No. 20301-WM, your Honor; and in Case 20302-WM it will be Exhibit No. 9.

(The exhibit referred to was marked Plaintiffs' Exhibit 6 in case 20301-WM and Plaintiffs' Exhibit 9 in case No. 20302-WM, for identification.)

The Witness: Which do you wish me to examine? What shall I examine, please?

Mr. Hughes: Will you read those three pages, Mrs. Gilliland, please?

The Court: Read it to yourself, and tell us when you have finished.

Have you finished reading it?

The Witness: I am through.

Direct Examination

Q. (By Mr. Hughes): Mrs. Gilliland, I call your attention to the correction on that. Are those not your initials?

A. Which initials? I don't see them. Where are they?

Mr. Hughes: About the middle of the page there.

The Court: Can't this be covered by stipulation?

(Testimony of Elsinore Machris Gilliland.)

Mr. Murphey: I have not been shown the document. [151]

The Court: Haven't you shown counsel the document?

Mr. Hughes: I did just two minutes ago, your Honor.

The Witness: I didn't write that myself.

Mr. Murphey: Just a minute, Mrs. Gilliland. There is no question pending.

I saw them less than a second when they were taken.

Mr. Hughes: I just got it this morning, your Honor, from Phoenix.

Are those your initials?

The Witness: Yes.

The Court: What are the initials?

The Witness: E.C.M.G.

Q. (By Mr. Hughes): And that is pages 41, 42 and 43? A. 43.

Q. In the deposition taken of you in April, 1955?

Mr. Murphey: If she knows.

Mr. Hughes: If you know.

The Court: Just hand it to the clerk.

(Whereupon the document was handed to the clerk and then placed before the witness.)

The Witness: Find out what date that is. I can't see it. [152]

The Court: Give it to Mr. Murphy. Perhaps we can have a stipulation.

(Testimony of Elsinore Machris Gilliland.)

(Whereupon the document was handed to counsel.)

Mr. Murphey: I offer to stipulate with Mr. Hughes that at the time of taking of the deposition in Phoenix, Arizona on April 15, 1955 in connection with litigation then pending, taking of her deposition by Mr. Philip Barnett representing Mr. Gilliland, that the witness—and, of course, all of this will be subject to my objection, if the Court please.

The Court: Can't you stipulate whether or not this is a true copy of the pages it purports to be of the deposition?

Mr. Murphey: I do not have the deposition, if the court please. Nor did I have a copy of it.

The Court: Very well. Proceed.

Mr. Murphey: That *Mr.* Gilliland was interrogated on the subject matter of a new item, in substance, quoting me, her attorney, "They are very happy and definitely very much married."

In response to that Mrs. Gilliland said that that statement was correct in substance, but "our public has to be satisfied. They have got to know I am happy. If the public doesn't know that I am happy, they are very unhappy. I have my public. [153]

"Q. I don't understand.

"A. I have a public of my own and my public has to be satisfied.

"Q. What roughly is your public?

"A. Oh, I have the whole country. I have my own public. And if they thought Mr. Gilliland was

(Testimony of Elsinore Machris Gilliland.)

mistreating me or very unkind, things wouldn't be very good for him. So we all tried to be facetious. We are divinely happy."

I stipulate that she so testified. And my objection is that it is incompetent, irrelevant and immaterial, and an attempt to impeach the witness on an immaterial point.

Mr. Hughes: If your Honor please——

The Court: Do you accept the stipulation?

Mr. Hughes: I accept the stipulation.

The Court: The objection is overruled. The stipulation is received in evidence. Proceed.

The alleged excerpt from the deposition is marked for identification as Exhibit 6 in the Lyons case and Exhibit 9 in the Meyers case, Mr. Clerk. And the deposition of the witness Ida Barr is Defendant's Exhibit A for identification in both cases, is that right?

The Clerk: That is correct, in both cases.

The Court: You may proceed.

(The exhibit referred to was marked Defendant's Exhibit A in both cases.) [154]

Mr. Hughes: If your Honor please, the clerk has been handed a certified copy of the complaint in the annulment proceeding in Riverside, California.

At this time plaintiffs move that the complaint which is signed and verified by Mrs. Gilliland be admitted into evidence.

Mr. Murphey: That is objected to as being in-

(Testimony of Elsinore Machris Gilliland.)

competent, irrelevant and immaterial to any issue in this case.

The Court: May I see it, Mr. Clerk?

The Clerk: Yes, sir.

(Whereupon the document was handed to the court.)

The Court: It seems to me that it might be more properly admissible on rebuttal than your case in chief. Of course, it is a matter of order of proof.

I will overrule the objection and receive it as Exhibit No. 7 in the Lyons case and Exhibit 10 in the Meyers case.

Is that correct, Mr. Clerk?

The Clerk: That is correct, your Honor.

(The exhibit referred to, marked Plaintiff's Exhibit 7 in Case No. 20301 and Plaintiff's Exhibit 10 in Case No. 20302, was received in evidence.)

Mr. Hughes: If your Honor please, at this time plaintiff Meyers will move for admission into evidence of all [155] the exhibits that haven't been previously admitted. And I am sorry, I have lost track of them. I have been unable to keep up.

The Court: I don't know of any that have not been offered by the plaintiff, except the excerpt from the Gilliland deposition, which is marked as Exhibit 6 in the Lyons case and Exhibit No. 9 in the Meyers case.

Are there any others?

The Clerk: No, those are the only ones, your Honor.

(Testimony of Elsinore Machris Gilliland.)

Mr. Hughes: That statement and all the rest have been admitted.

Q. (By Mr. Hughes): Mrs. Gilliland, when were you married to Ray C. Gilliland?

A. May 3, 1954.

Q. And when were you divorced from Ray C. Gilliland? When did you receive your interlocutory decree?

A. I think I received it—I don't even know.

Q. Would it refresh your recollection if I were to say it was June 13, 1956?

A. Probably so.

Q. Did you ever have sexual intercourse with Ray C. Gilliland during the period of May 3, 1954 through June 13, 1956?

Mr. Murphey: Just a moment. That is objected to [156] as being incompetent, irrelevant and immaterial; no proper foundation laid.

Mr. Hughes: If your Honor please——

The Court: There again it is probably more proper on rebuttal, a matter of order of proof, and the objection will be overruled.

Q. (By Mr. Hughes): Would you answer, please, Mrs. Gilliland? A. No.

Mr. Hughes: I have no further questions, your Honor.

The Court: Any questions?

Mr. Murphey: No questions of this witness at this time.

The Court: You may step down, Mrs. Gilliland.

(Witness excused.) [157]

* * * * *

Mr. Murphey: Very well, your Honor.

Will Miss Fay Lyons take the stand, please.

And I may say this, your Honor, that this is pursuant to cross examination of this witness which I reserved.

FAY LYONS

called as a witness by the plaintiffs, having been previously sworn, was recalled and testified as follows:

The Court: Will you state your name, please?

The Witness: Fay Lyons.

The Court: You have been sworn in this case.

The Witness: Not today. In this case, yes.

The Court: You may proceed.

Cross Examination

Q. (By Mr. Murphey): You were born November 29, 1913 at New York City, were you not?

A. Yes, I was.

Q. Your father's name was Isidore W. Lyons?

A. Yes.

Q. Your mother's name was Elsa Spielholz?

A. Yes, sir. [158]

Q. And you have one sister, Lois Springer?

A. Yes.

Q. You had an elementary and high school education, is that right? A. Yes.

Q. You moved to Florida in 1951? A. Yes.

Q. You have been in show business?

A. When I was a child, up until I was 18 or 17. Then I left show business.

(Testimony of Fay Lyons.)

Q. You were a chorus girl in George M. Cohan Productions?

A. Not exactly, no. I understudied. Shall I continue now?

The Court: You may continue explaining it, if you wish. You may explain any answer you give.

The Witness: Yes. I was 12 or 13 years old, and I had the privilege of being in a George M. Cohan production in which I understudied and did appear in two or three very lovely production numbers. I was not a chorus girl as I think of the term.

Q. (By Mr. Murphey): Now, you were also in one George White show?

A. Yes, when I was 16.

Q. You posed for Flagg as a child for a cover on Cosmopolitan Magazine.

A. Yes. James Montgomery Flagg, illustrator, did my head, which appeared on the Cosmopolitan cover when I was, oh, eight or nine years old.

Q. You have been married twice? A. Yes.

Q. The first was to Arthur Cohen in 1932.

A. Yes.

Q. You were divorced from Mr. Cohen at Reno, Nevada in 1937, isn't that correct? A. Yes.

Q. The answer? A. Yes.

Q. You married Emanuel M. Pomerantz in 1944 at New Jersey, did you not? A. Yes.

Q. You had one son born by him on March 30, 1949. A. Yes.

(Testimony of Fay Lyons.)

Q. You were divorced from Mr. Pomerantz on April 9, 1952? A. Yes.

Q. At Miami, Florida. A. '52, yes.

Q. Now, you knew Ray Gilliland, did you not?

A. Yes. [160]

Q. You first met him in 1937 at Reno, Nevada, did you not?

A. Yes. My family and I met him then; my mother and my sister and I met him at that time.

Q. You took a trip with Mr. Gilliland to Oregon with five or six other people. You stayed a day or two and returned to Reno, did you not?

A. Yes, I did join these other people and go there, and returned the next day I returned home.

Q. You don't remember whose car was used on this trip?

A. No. That was in 1937, 21 years ago. No, I don't remember the car.

Q. You went to New York in 1938, did you not?

A. I think so.

Q. And you saw Mr. Gilliland in New York, didn't you?

A. Some time after 1938 I did see him in New York. I don't know when.

Q. He visited at your house several times, did he not? A. Yes, he and my—

Q. And you ran into him at a restaurant in New York on one occasion?

A. Yes, unexpectedly I did. I was with friends at Luchow's on 14th Street, New York. I was with friends, and hadn't seen Ray, oh, I don't know, for

(Testimony of Fay Lyons.)

two or three years. And upon leaving the restaurant I heard my name called, and [161] there was Mr. Gilliland with some people. Yes.

Q. Now, in 1954 you were in Miami Beach, Florida, were you not? A. Yes.

Q. And you saw Mr. Gilliland at Miami Beach in 1954? A. I did, yes.

Q. At that time you were working at L'Aiglon?

A. L'Aiglon, yes. "Little Eagle" in French.

Q. You had a hat a cigarette concession, did you not?

A. Among other duties, yes. Yes, I had these concessions.

Q. You personally sold cigarettes?

A. Sometimes.

Q. On one occasion you had dinner at the Patio Restaurant with Mrs. Meyer and Mr. and Mrs. Stern, did you not?

A. No, I did not have dinner. I was—I did not have dinner at the Patio Restaurant.

Q. Now, your hours at the L'Aiglon were approximately 7:30 p.m. to midnight, and at times 2:00 a.m., were they not? A. Yes.

Q. You worked at the L'Aiglon restaurant until approximately April 1956? A. Yes.

Q. By the way, that restaurant closed, did it not, about that time? [162]

A. Did it close at that time?

Q. Yes.

A. Yes. It always closed every April. It was

(Testimony of Fay Lyons.)

open only from early December, or sometime in December, until April. It closed that year.

Q. Now, after this you had a cigarette and hat concession at the Felix Young restaurant.

A. May I explain this, Mr. Murphey?

Q. Did you have a hat and cigarette concession?

A. Yes.

Q. And you took reservations, did you not?

A. Yes.

Q. Now, is there any explanation you want to make?

A. Yes. I think it's probably a little irregular what I do at Felix Young's restaurant, and what I did at L'Aiglon. Actually, if Mr. Young were to be considered a host and Mrs. Young a hostess, then in that same sense I am considered a hostess. So far as selling cigarettes and being a checkroom girl, it is true I do own these concessions. Very often we have the cigarettes, and the very, very fine cigars placed where people pick what they want and put the money in the box. I mean to say, I just think it's fair to say when I might be asked, "Are you a cigarette girl and a check room girl" that I be permitted to explain the details [163] that fit the situation, which I admit are a little unusual.

I greet our patrons. I am on the telephone. And I have personal contact with them, with cigarettes and the check room not entering the picture at all.

Q. But you take reservations?

A. In fact—excuse me—in exchange for these

(Testimony of Fay Lyons.)

concessions—I don't pay for these concessions, you see. I offer my services to the establishment in return for which I own the concessions. I get no salary, receive no salary from L'Aiglon nor the new place, Felix Young restaurant.

Q. Have you completed your explanation that you wanted to make?

A. Well, I think I feel a little better, you know, there is this appellation of cigarette girl and hat-check girl, or something. But, I am sorry for taking so much time.

Q. But you do take reservations?

A. Oh, yes.

Q. You arrange birthday and anniversary parties?

A. No, I don't arrange the parties. It is just that people speak with me and discuss what flowers—incidentally, I do all the flower arrangements for the tables for the parties. I don't make arrangements, but they will speak to me and tell me what they want, and I see that their desires are carried out from A to Z in the kitchen itself. I don't make the arrangements. I just have preliminary discussions [164] regarding the wedding anniversaries or engagement parties or graduation, you know, whatever the occasion calls for.

Q. Have you ever had any person work for you handling cigarette sales and the checkroom at either restaurant?

A. I can only say almost the entire staff. If I am not there one of the captains, one of the wait-

(Testimony of Fay Lyons.)

ers—in this new place, for the last two years we have had a little page boy, Johnny, the page boy, and he handles the cigarettes really more than I do.

Q. You don't pay him, do you?

A. Yes, I do.

Q. You pay these people?

A. I do, certainly. I take care of Johnny, when he helps me, which he does very often. I mean, cigarettes are very incidental to what I do there, actually.

Q. You went out with Mr. Gilliland once in Miami in 1954 after work one night, did you?

A. Yes, to the Patio restaurant, where we were invited to join 10 or 12 people, that being the opening. And that is where I met Mrs. Meyers. Mr. Gilliland introduced me to Mrs. Meyers at that time. And I spent—we got there probably 11:00 or 12:00, and as I said, I don't have any social life because of my hours, working nights and being at home during the day to run my house and take care of my child and that, so I said—— [165]

Q. If you will pardon the interruption. If you will just try to answer the question, I think we will get along better.

A. Well, I am trying to explain how——

Q. If after you answer as concisely as you can, and you want to make any explanation, I think the court will allow you to.

Now, from this party that you have related you drove Mr. Gilliland's car home, did you not?

A. I did, his rental car, because I stayed about

(Testimony of Fay Lyons.)

a half hour and had to go home and go to sleep. And he said——

Q. Now, just wait a minute.

A. I drove his rented car home.

Q. Just a minute.

Mr. Murphey: I think we need a little assistance here from the court. She drove his car home. Now, that is all I asked, and now we get a great big——

The Court: Well, she made an explanation as to why she drove the car home. She is entitled to make the explanation. She answered the question first.

Mr. Murphey: All right.

The Court: Many witnesses make the mistake of wanting to make the explanation first and then answer the question last. [166]

You answer the question first, and then you may make any explanation you wish to.

Q. (By Mr. Murphey): The next day you dropped Mr. Gilliland's car off at Mrs. Meyers' home, did you not? A. Yes, in returning it.

Q. This is all in January of 1954? A. Yes.

Q. Now, let's take 1955. It is a fact that you saw Mr. Gilliland again at Miami Beach, did you not? A. Yes.

Q. How many times?

A. I would think possibly two, possibly three or four. I do remember his being to the house for dinner on, I think, two occasions; and I think at L'Aiglon on one or two occasions. Probably four

(Testimony of Fay Lyons.)

or five. A few. I don't pin down the exact number—but a few times.

Q. Now, let me ask you this: You knew, did you not, that Mr. Ray Gilliland married Elsinore Machris on or about May 3, 1954?

A. Yes, I saw it in the papers, their party, big wedding party.

Q. You knew, did you not, that commencing about January of 1955 that they were having marital difficulties?

A. Yes. I felt very sorry about it.

Q. You knew this when you saw Mr. Gilliland there in Miami Beach in 1955? [167] A. Yes.

Q. Now, how long was Mr. Gilliland there at Miami Beach on this occasion in 1955?

A. Some days. I don't recall. A few days.

Q. Now, the next time you saw Mr. Gilliland was at Scottsdale or Phoenix, Arizona, was it not?

A. Yes.

Q. This was in May of 1955?

A. No, this was in April of 1955. I have the feeling that it was about the 23rd or 24th. L'Aiglon closed, I remember distinctly, on the 16th of that year. And I seem to recollect that it was one week later that I left. I think it was exactly a week later. So I think it was the 23rd of April.

Q. Did you fly out? A. Yes.

Q. Alone? A. Yes.

Q. Mr. Gilliland met you at the airport?

A. Yes.

(Testimony of Fay Lyons.)

Q. And took you to the Paradise Valley Guest Ranch? A. Yes, he did.

Q. Did you register at that place?

A. I don't think I did. There didn't seem to be—we arrived. Mr. Silverman came out, and Mrs. [168] Silverman, the owners of the Paradise Valley Guest Ranch, and my bags were taken in. And they showed me one or two apartments. And nothing was said to me about registering. It didn't come up at all in the conversation. I don't think I registered.

Q. Mr. Gilliland took you up there, did he not?

A. He drove me from the airport and introduced me, stayed a few minutes, and then left, yes.

Q. Had you received a telephone call from Mr. Gilliland inviting you to come out there?

A. Yes. Not exactly inviting, but suggesting or asking me when I thought I would come out, since there had been some discussion with Mother and Dad and me on his trip when he was in Miami some months before about—well, it had to do with the possibility of the family moving to Arizona sometime. It was vague, and so on. And I said that I would come out. And he called. I spoke to him on the phone to tell him when I was coming. To that extent we discussed my coming out.

Q. In other words, just prior to your coming out you phoned Mr. Gilliland that you were coming?

A. Yes, to let him know when.

Q. I understood you to testify that you went out there for the purpose of possible business loca-

(Testimony of Fay Lyons.)

tions, either [169] for the hotel or motel business—

A. Yes.

Q. ———or a restaurant.

A. Yes, possibly.

Q. And that you planned to stay a little while and then return to Miami and take a course on restaurant and hotel management, or cashiering.

A. Yes. Not restaurant but just—it's the hotel operations school, Lindsay-Hopkins — not restaurant, but hotel.

Q. Now, this Paradise Valley Guest Ranch is approximately three or four blocks from Mr. Gilliland's house, is it not?

A. I think so. I would say so.

Q. Did you have any correspondence with Mr. Gilliland about coming out?

A. No, not that I remember. I don't remember any.

Q. How long did you stay at this Paradise Valley Guest Ranch on this first occasion?

A. Six or seven days, or eight. Seven or eight days, or thereabouts.

Q. While there you met Blanche Lampert?

A. Yes, I did, for one day. She started on the 1st of May. But I guess I am getting ahead.

Yes, I did meet Blanche Lampert. [170]

Q. And I take it from what you volunteered that the day after you met her you left, is that right?

A. Thereabouts. I mean to say, she said May 1st. I am not sure. It seems to me that I seen her

(Testimony of Fay Lyons.)

more than once, you know; possibly twice before my leaving May 2nd. However, this I am not sure of. I would say that I saw her once or twice.

Q. You also met Ray Lampert, did you not?

A. Yes.

Q. And he kept up the yard at Mr. Gilliland's home?

A. Yes, he did the yard work, and Blanche did come in late about 4:30 or 5:00 o'clock to cook their dinner. And so my understanding was, and everybody's understanding was that these people were not employed by Mr. Gilliland at all, but in exchange for the room which he let them use they offered their services in a compensatory sort of way.

Q. This house has a room separated from the main house by a carport, does it not?

A. Yes.

Q. And Mr. and Mrs. Lampert occupied the bedroom separated from the house by the carport?

A. Yes, seemed to.

Q. You went down to Mr. Gilliland's house in the evening?

A. I might have gone down in the evening, 7:00 o'clock in the evening when I was invited for dinner, when he had dinner guests, yes. I guess I did go down in the evening on occasion.

Q. How many times were you down there?

A. Just a few times. I don't remember.

Q. Would you tell us how many? Estimate it the best you can.

(Testimony of Fay Lyons.)

A. Go down to his house in the evening. That would be very difficult for me to give you in numbers. Several times.

Q. And when you were there you had highballs, did you not?

A. I don't—well, I might have had an occasional one, one or two; and very often none when the other people were having them, for the reason that I have never liked the taste of alcohol. I just don't. I am not a drinking woman. I don't like it.

Q. Were you ever at Mr. Gilliland's house when there were no other people present?

A. I don't think I ever was, maybe with the exception of when one of the guests would run out to the car or just close to the market a few blocks down the road. Because—I would have normally, but in this case I couldn't have and didn't for the reason that the very first day I arrived there Judge and Mrs. Blake were there, and several of the local people at the house. And as it began to draw towards twilight, I mean just about dusk, somebody said, "I have been watching the car up the road and there is something very odd about this. This car has been parked there for an hour or more with the little parking lights on and I wonder what it's doing there."

And as we looked out that window, the kitchen window, we noticed the car start and come along very slowly, such as ten or 15 miles an hour, from three or four hundred feet up north—is it? Well. I think I said in my deposition. Now, I can't re-

(Testimony of Fay Lyons.)

member the directions. Mr. Gilliland's house being here—in other words, not towards the Valley Ranch, Paradise Valley Ranch, but the other way, Mr. Murphey. And this car, anyway, proceeded very slowly to the house and circled the house, went around by the back where the guests' cars were parked, and then made a full circle, and then went back to the starting point.

And somebody said, "Well, it must be detectives," you know, or "may be detectives, or someone watching the house." And this happened so many, many times after that that I realized that I might be subjecting myself or exposing myself to something very unsavory to me, and I had better not ever be alone with Mr. Gilliland in view of this.

I mean, this is only one incident, of course. There are many others. In other words, we were aware that [173] were were being followed or shadowed or—well, followed, I guess.

Q. Who are "we"? Mr. Gilliland and you?

A. It was common discussion.

Pardon me? The people there. No, the people there.

Q. Who was there?

A. Judge Blake and Mrs. Blake, and the first night, the first evening, I don't know if the Kerwins got in. Then Clyde Williams came.

Q. I meant on this occasion when you saw this car around there.

A. Judge Blake and Mrs. Blake, and some other people were in the house, local people. At this

(Testimony of Fay Lyons.)

moment I don't know if Mr. Carpenter and Mr. Turbeville and those were there, or not. But we were sitting in the kitchen, and I saw the car come around and circle, and—well, I would like to add that in an hour or so I saw the car do the same thing again. This thing was repeated two or three times.

Anyway, I had the feeling that I had come into a hornet's nest or in the midst of something that I would be better off not ever being with Mr. Gilliland.

Q. That made you very wary, didn't it?

A. Well, not weary, no——

Q. I said wary, concerned. [174]

A. Yes. I didn't want to—I realized that I should not be exposed to anything of that nature.

Q. How long was it after you arrived there that you received a call from your mother concerning your father?

A. I think it was just four or five days after I arrived there.

Q. Now, you drove from Scottsdale with Clyde Williams and Ray Gilliland, did you not, in Mr. Gilliland's car; first to Knox City, Texas?

A. Do you know that I cannot remember now distinctly whether Clyde left with us or not. Clyde had come to visit Ray and stay at his house, and they had business to discuss. And he had properties he wanted Mr. Gilliland to look at. And he said that he had to leave immediately or they would

(Testimony of Fay Lyons.)

lose their opportunity with these particular properties.

And I am really not sure whether Clyde left first to go back to Texas, and Ray following in a day or two; or whether Clyde stayed and the three of us left for Knox City. I really don't recall.

Q. Well, if Clyde left first, you drove with Mr. Gilliland to Knox City, is that right?

A. Yes.

Q. Have you any idea what time of day you left Phoenix or Scottsdale?

A. I think it was very early in the morning, 6:00 [175] o'clock, maybe, or 7:00 o'clock, or just dawn.

Q. Did you drive straight through to Knox City? A. I don't remember that.

Q. You don't recall whether you stopped overnight?

A. No, I am sorry. I don't remember.

Q. In any event, you got to Knox City and called on Clyde Williams?

A. We first went to Judge Williams' house.

Q. You had lunch there?

A. At Judge Williams'. That's a different house from Clyde's. It's Clyde's father's home.

Q. And after a matter of a stop of a couple of hours, possibly, you drove from there to Ft. Worth, Texas, did you not?

A. On the way to Ft. Worth we made stops in between at these oil properties.

(Testimony of Fay Lyons.)

Q. But, I mean, you did drive during the one trip from Knox City to Ft. Worth.

A. Yes.

Q. Mr. Clyde Williams and you and Ray Gilliland, is that correct? A. Yes.

Q. When you got to Ft. Worth you stayed at the Ft. Worth Hilton Hotel, did you not?

A. Yes. [176]

Q. Did you register yourself? A. No.

Q. Who did the registering?

A. I am not sure, but I think that Clyde Williams did. I am not sure. Ray had the habit of saying to whoever was there to register, and he could have. I wouldn't say for sure. I didn't.

Q. Did you have adjoining rooms to Mr. Gilliland at that hotel?

A. We had consecutive rooms.

Q. Was there a door between?

A. I don't know.

Q. Would you say that there was not a door between? A. I would not say that.

Q. Where was Mr. Clyde Williams' room?

A. In the very next room to mine. We had three consecutive rooms. Whether they were adjoining or not, I couldn't say one way or the other.

I have noticed that in the older hotels, many of the older hotels have doors because, you know, they can be locked, and they are locked or they are opened at will, if so desired.

I don't know if this did or not. It probably did have. There were doors probably separating each of

(Testimony of Fay Lyons.)

these three rooms, because it is a very old hotel.

Q. And at that club you met some friends of Clyde Williams, didn't you?

A. Met them only in that they left their table, got up from their table to leave, and passed our table, noticed Clyde and said, "Hello, Clyde." And Clyde returned the greeting. And then Clyde introduced Mr. Gilliland and me. And the people left. I mean to say I met them, but very briefly.

Q. Now, isn't it a fact that Mr. Gilliland introduced you as Mrs. Gilliland?

A. It is not the fact, to my recollection, at all. Not according to my recollection.

Q. Do I understand you correctly that you now state that he did not do so?

A. I have no recollection of that at all.

Q. You wouldn't say whether he did or did not?

A. No, I wouldn't. There were other people there. It is within the realm of possibility. He might have said this while I was engaged in greeting one of the wives or the ladies. I don't know. To my recollection I certainly didn't hear him say that.

Q. That is your present memory, is that it?

A. Yes.

Q. Now, you spent the night there at the——

A. Yes, we all stayed that night, because the men [178] had business to do in the morning. That was the reason for their going there.

Q. You occupied the bedroom adjoining Mr. Gilliland's bedroom?

A. Connecting.

(Testimony of Fay Lyons.)

Q. Yes.

A. Well, I don't mean that "connecting." I mean next to. The three rooms were one next to the other. That is what I meant when I said "consecutive." The three were together. I was in the center one.

Q. The next day Mr. Williams and Mr. Gilliland went out to the golf tournament, didn't they?

A. Yes, they did, in the afternoon. In the morning they were out on business.

Q. Now, Mr. Gilliland gave you some money as they left to go to this tournament with which to do some shopping, did he not?

A. He did not. He did ask, because he and Mr. Williams had been shopping, and he had bought himself many new things, and he had asked me, "Would you like to do some shopping and get yourself a little present this afternoon?"

And I told him, "No," that I didn't. And I told him what I planned to do with my afternoon. And I did it. It was personal.

Q. He offered you money but you refused it?

A. Yes, I did.

Q. Now, did you have dinner at the Hilton Hotel that night with Mr. Gilliland and Mr. Williams?

A. Yes.

Q. Now, the next day Mr. Gilliland and you left in his car for Miami, Florida, did you not?

A. Yes, I did. The reason that I drove from Scottsdale to Ft. Worth was only after not being able to get an airline reservation, a ticket out of

(Testimony of Fay Lyons.)

Scottsdale to Miami. So it was at Mr. Gilliland's suggestion, when he discovered that he had to leave immediately to meet Mr. Williams, he had to leave quickly, because Mr. Williams had told him——

Q. Excuse the interruption. You have already given that explanation as to the trip to Ft. Worth. But I now ask you if you didn't from Ft. Worth drive with Mr. Gilliland to Miami, Florida?

A. Yes. Only because I couldn't get an airplane reservation, either, out of there, which Mr. Gilliland and Mr. Williams had almost promised me. They said, "It will be easier for you to leave Ft. Worth because Dallas is right next to it and you will have more opportunity to get a ticket." Whereas in Phoenix they said, "We have nothing. We have no reservations. Maybe in three or four days." And I had to get home quickly, because of my father's stroke. So, I think that that fits in. But it turned out that I was [180] compelled to drive from Ft. Worth to Miami, because there was no other way I could get there.

The Court: It's time for the noon recess.

Had you finished?

The Witness: Yes.

The Court: We will take the noon recess at this time until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day.) [181]

Wednesday, June 4, 1958; 2:00 P.M.

The Court: Are there any ex parte matters?

The Clerk: No ex parte matters, your Honor.

The Court: You may proceed with the case on trial.

FAY LYONS

called as a witness by the plaintiffs, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Murphey): Miss Lyons, we had reached the point where you left Ft. Worth with Mr. Gilliland in his car.

What was the first city you stopped at?

A. I don't remember.

Q. What hotel did you register at?

A. I don't remember.

Q. What hotel did you stay at?

A. I don't remember.

Q. Do you know?

A. I don't remember.

Q. Do you have any knowledge of any of the cities you stopped at between Ft. Worth and Miami Beach? [182]

A. I remember New Orleans. I remember Tampa. Before that I think Alabama. Montgomery, I just remember those.

Q. Do you remember the names of any of the hotels that you stayed at, or motels? A. No.

Q. Did you have adjoining rooms with Mr. Gilliland in each of these hotels, or motels?

A. Sometimes; depending on the available rooms

(Testimony of Fay Lyons.)

at the time. Sometimes they were next to each other and sometimes they weren't.

Q. Well, is it of any importance to you whether they were adjoining or not?

A. Absolutely none.

Q. Did Mr. Gilliland do the registering at these hotels or motels?

A. On occasion. Sometimes he did. Sometimes I did.

Q. It is a fact, is it not, that Mr. Gilliland paid all of these lodging bills?

A. At the motels, yes.

Q. Or hotels? A. Or hotels, yes.

Q. Isn't it a fact that Mr. Gilliland paid for your meals on this trip? A. Yes.

Q. Now, when you got to Miami Mr. Gilliland stayed [183] at North Beach, did he not?

A. Yes.

Q. He was in town two or three days, isn't that the fact?

A. I wouldn't be sure. I recollect that he left either the following day, the day after our arrival at my home, after arrival in Miami, he left the following day or the one after that. So, one or two days later. I would be sure of that.

Q. Before he left, I believe you testified on direct examination that he phoned you.

A. Yes.

Q. Saying, in substance, he was leaving for Scottsdale. A. Yes.

Q. And would like to see you. A. Yes.

(Testimony of Fay Lyons.)

Q. And he stopped by at your home to say good-bye, is that right? A. Yes.

Q. While he was there isn't it a fact that you went over to Mr. Gilliland's hotel and stayed two or three hours in the afternoon?

A. I went once with my little boy in the afternoon. We went swimming. And we stayed an hour or two, and then left. [184]

Q. On that occasion you invited him back for dinner, did you not? A. Yes, I think I did.

Q. Do you recall seeing him any other time at Miami while he was there on this occasion?

A. No, I don't remember.

Q. You stayed there about a week or ten days, did you not? A. I think so.

Q. Then you flew out to Phoenix with your son, did you not? A. Yes.

Q. Mr. Gilliland met you at the airport?

A. Yes.

Q. He took you out to the Paradise Valley Guest Lodge? A. Yes.

Q. Or ranch. A. Yes.

Q. And did you register on this occasion?

A. I don't remember doing so.

Q. You occupied the same apartment, No. 1?

A. Yes.

The Court: The same as what?

Mr. Murphey: The same apartment, No. 1. [185]

The Court: As when?

Q. (By Mr. Murphey): That was the same apartment that you had when you stayed there be-

(Testimony of Fay Lyons.)

fore, was it not, No. 1? A. I think so.

Q. You stayed there about three or four weeks, did you not?

A. My stay was interrupted by a trip—you mean in total? I mean, I stayed there for a little while and then I went to Los Angeles and returned. I don't quite understand the question. You mean without interruption?

Q. Your over-all stay at the Paradise Valley Guest Lodge after you came back from Miami was three or four weeks, was it not?

A. I'd say—I think I remember—I'd say maybe four or five, all together. I think it was more than three. I think I arrived maybe the third or fourth of June on the second strip with my little boy, and left July 7th for Miami. So I think that would be five weeks, or thereabouts; more than three.

Q. Did you see Mr. Gilliland while you were in California on this trip?

A. No. I didn't know his whereabouts while I was here.

Q. As I understood you on direct examination that trip to Los Angeles took some five days. [186]

A. I think so.

Q. And when you returned you stayed at the Paradise Valley Guest Lodge? A. Yes.

Q. When you returned Miss Schor, or Beatrice Schor went with you? A. Yes.

Q. When you were at Scottsdale the first time your son was not with you, was he?

A. No, he was at school.

(Testimony of Faye Lyons.)

Q. When you returned from Miami about June 3rd or 4th, your son was with you? A. Yes.

Q. When you first arrived at Scottsdale upon your return from Miami Beach, Ray Gilliland and Mr. Clyde Williams drove out to the Paradise Valley Guest Lodge, did they not? A. Yes.

Q. And they were driving a brand new Dodge sedan automobile, were they not?

A. Yes, they were.

Q. Now, isn't it a fact that Mr. Gilliland handed you the keys and said, "Here, this is all for you." Or, "This is for you." A. No.

Q. What did he say? [187]

A. He said, "It's all yours to use while you are here. Something—I mean, not verbatim, but, "It's all yours to use while you are here." Which I did.

Q. Did he say anything, in substance, "You can't be without one"?

A. He said, "It's very hard to be in this country without a car," or something to that effect: "very difficult."

Q. Didn't he say, "this is your car"?

A. I don't remember those words.

Q. Would you say that he did not say, "This is your car"?

A. I would say that. I would say that he did not say, "This is your car." He could have said, "This is your car to use for your stay here;" or, "you just help yourself and use it as you please while you are here."

(Testimony of Fay Lyons.)

Q. While you were there you used this Dodge automobile, did you not? A. Yes.

Q. It is a fact, is it not, that Mr. Gilliland gave you money?

A. He at one time gave me money——

Q. When was that?

A. ——for a dog for my boy.

Q. When was this?

A. I don't remember. It was when Dan was there. It [188] had to do with a dog that he'd get for Dan. And I went down to the little shop in the village of Scottsdale and I looked at two or three—one or two poodles, I remember, and one little griffon. And then I said to my child that I thought it would be better, more practical, to wait until we returned home to Miami to get a dog. And I didn't think we should have a dog on the trip. And Mr. Gilliland did give me money to get the dog for Dan when we got home.

Q. He gave you \$200, didn't he?

A. Yes, I think it was that.

Q. When he handed it to you he said he had won it? A. Yes.

Q. And for you to buy something for Dan?

A. Yes.

Q. And you took the money? A. Yes.

Q. Now, when you returned from Miami you saw Mr. Gilliland on many occasions, did you not?

A. When I returned from Miami?

Q. To Scottsdale.

A. From Miami to Scottsdale. Yes.

(Testimony of Fay Lyons.)

Q. Was this daily? A. No.

Q. How often? A. Several times. [189]

Q. During the total of three weeks how many times would you estimate you saw Mr. Gilliland?

A. Eight or ten.

Q. Did he take you to dinner? A. Yes.

Q. Did he take you to lunch?

A. No, I don't remember lunch.

Q. He did take you on a trip, did he not, to Prescott to some rodeo?

A. Yes, we took a trip one morning with my little boy to see the rodeo, and we left at 10:00 or 11:00 o'clock, and we were back about 5:00. We didn't see the complete rodeo. And I know that we returned before dinnertime back to Scottsdale, the three of us. I wanted Dan to see a rodeo.

Q. On these occasions when you saw Mr. Gilliland you saw him at his home, did you not, in Thornwood Acres? A. Not always.

Q. How many times did you see Mr. Gilliland during this three weeks at his home?

A. Several. I don't know. Seven or eight, maybe.

The Court: Have you about concluded?

Mr. Murphey: I haven't very much more, your Honor. I have a little bit more.

Q. (By Mr. Murphey): Did you ever go to Mr. Gilliland's house in the late afternoon and stay until 2:00 or 3:00 [190] o'clock in the morning?

A. No.

(Testimony of Fay Lyons.)

Q. Did you ever have highballs with Mr. Gilliland alone in his home?

A. I don't remember.

Q. Would you say that you did not have highballs with him in his home alone?

Mr. Hughes: Your Honor, I object to that line of questioning. The question has been asked and answered.

The Court: Sustained.

Q. (By Mr. Murphey): Did Mr. Gilliland, to your knowledge, stay at the Paradise Valley Guest Lodge at any time while you were there?

A. No.

Q. You had an argument or disagreement with Mr. Gilliland, did you not, at which time he took the automobile away from you? A. No.

Q. Did you ever throw a glass at him?

A. No.

Q. Did he ever slap you? A. No.

The Court: Did you ever slap him?

The Witness: No, your Honor.

Q. (By Mr. Murphey): Let me ask you, did you phone [191] George Therrell at San Francisco in June 1955 and ask him where Ray Gilliland was?

A. No. I never have heard the name before you asked me that when you took my deposition. I didn't know the name.

Q. You have testified that you went to Phoenix with the idea of buying a business, did you not?

A. Yes.

Q. Well, as a matter of fact, when you left for

(Testimony of Fay Lyons.)

Scottsdale you had seven to nine hundred dollars, didn't you? A. Thereabouts, I think.

Q. And that is all you had?

A. Yes, thereabouts. Several hundred. Thereabouts.

Q. You flew out, did you not? A. Yes.

Q. Isn't it fact that Mr. Gilliland wired you the money for the plane fare from Miami to Scottsdale, or Phoenix?

A. He did, I think, before I went back the second time with my boy, because the preliminary negotiations and meetings regarding this business, or a business, were interrupted. We hadn't finished the first trip when I headed back for Miami. And so it was necessary to go out [192] again and complete these meetings.

Q. In any event, you accepted this money for fare?

A. He wired it to me, unbeknownst to me, and he said something about that that was for the return ticket.

Mr. Murphey: I would like to ask this witness some questions from her deposition, if the court please.

The Court: Impeaching questions?

Mr. Murphey: Yes.

The Court: Very well. On subject matter not heretofore covered?

Mr. Murphey: Well, her answers in response to certain of these questions do not correspond with the statements in her deposition.

(Testimony of Fay Lyons.)

The Court: Very well.

Mr. Hughes: If your Honor please, I am going to object unless the impeachment is done in the proper form by submitting the deposition to the witness.

Mr. Murphey: I would ask that the deposition be submitted to her.

The Court: Is it on file with the clerk?

Mr. Murphey: Yes, your Honor.

The Court: Mr. Clerk, get the deposition of the plaintiff Fay Lyons and open it.

Do you have it, Mr. Clerk?

The Clerk: Yes, your Honor. [193]

The Court: It will be marked Defendant's Exhibit B in both cases.

(The exhibit referred to was marked for identification in both Case No. 20301 and Case No. 20302.)

The Court: Place it before the witness.

(Whereupon the exhibit was placed before the witness.)

The Court: What page number and what lines do you wish me to read?

Mr. Murphey: Page 26, line 15.

The Court: Through line what?

Mr. Murphey: To line 23.

The Court: Read it to yourself, and let us know when you have completed it.

The Witness: Yes, your Honor. 15 through 23?

Q. (By Mr. Murphey): Yes.

A. I am finished.

(Testimony of Fay Lyons.)

Q. You testified, did you not, that you went to Scottsdale for the first time in May 1955?

A. Yes. Because you had mentioned that month first, and I did say yes, in May. It was the end of April.

Mr. Murphey: I would ask you to turn to page 19, if you will, please.

The Court: Let's not spend any time on discrepancies in dates unless they are really very vital.

Mr. Murphey: Well, they aren't of too much importance.

The Court: We all have difficulty remembering time.

Mr. Murphey: If the court please, no further cross examination of this witness.

The Court: Any redirect?

Mr. Hughes: Just a couple of questions, your Honor.

Redirect Examination

Q. (By Mr. Hughes): Miss Lyons, the clerk will show you what purports to be receipts for payment of lodging at the Paradise Valley Guest Ranch. Will you look at them and identify them, if you can?

A. Yes.

The Court: Have they been marked?

Mr. Hughes: Yes, your Honor, receipts from the Paradise Valley Guest Ranch, and receipt from the Del Capri Motel in Los Angeles, California.

The Court: Do you wish them marked as one exhibit?

(Testimony of Fay Lyons.)

Mr. Hughes: As one exhibit, your Honor.

The Court: They will be marked Plaintiff's Exhibit 8 in the Lyons case for identification. Is that [195] correct, Mr. Clerk?

The Clerk: That is correct, your Honor.

(The exhibit referred to was marked Plaintiff's Exhibit No. 8 in Case No. 20301.)

The Court: Place it before the witness.

These are not to be marked in the Meyer case, I take it?

Mr. Hughes: No, your Honor.

(Whereupon the exhibit was placed before the witness.)

Q. (By Mr. Hughes): Do you recognize all those? A. Yes.

Q. Those are the receipts you received when you paid your bill at the Paradise Valley Guest Ranch and also receipts when you paid your bill at the Del Capri in Los Angeles? A. Yes.

Q. And the dates that those receipts show occupancy were the dates on which you were at both of those places? A. Yes.

Mr. Hughes: I move this be admitted in evidence, your Honor, as Plaintiff Lyons' Exhibit 8.

The Court: Any objection?

Mr. Murphey: No objection.

The Court: Received in evidence, Exhibit 8 for [196] identification.

(The exhibit referred to, marked Plaintiff's Exhibit 8 in Case No. 20301, was received in evidence.)

(Testimony of Fay Lyons.)

Mr. Hughes: We are now moving, your Honor, to place before the court a guarantee policy and a copy of a conditional sales contract on the Dodge automobile.

The Court: Both marked as a single exhibit?

Mr. Hughes: As a single exhibit.

The Court: It will be Defendant Lyons' Exhibit 9 for identification and the clerk will place them before the witness.

The Clerk: Yes, your Honor.

(The exhibit referred to was marked Plaintiff's Exhibit 9 for identification in Case No. 20301.)

(Whereupon the exhibit was placed before the witness.)

Q. (By Mr. Hughes): Do you recognize those papers, Miss Lyons? A. Yes.

Q. Are those papers evidence that the car, one Dodge automobile, was, in June 1955, purchased by Ray C. Gilliland?

Mr. Anson: I object to that as calling for the conclusion of the witness.

The Witness: Yes.

Mr. Anson: I move to strike the answer. [197]

The Court: Yes. The documents, I assume, speak for themselves.

Do they cover the automobile?

Mr. Hughes: They cover the automobile.

The Court: The Dodge automobile we have been discussing?

(Testimony of Fay Lyons.)

The Witness: Yes.

Mr. Hughes: We move they be admitted.

The Court: Any objection?

Mr. Murphey: No objection.

The Court: Received in evidence as Exhibit 9 in the Lyons case.

(The exhibit referred to, marked Plaintiff's Exhibit 9 in Case No. 20301, was received in evidence.)

Mr. Hughes: I have no further questions, your Honor.

Mr. Murphey: No further questions, your Honor.

The Court: You may step down, Miss Lyons.

(Witness excused.)

The Court: The defendant's next witness?

Mr. Murphey: I offer at this time the stipulation counsel have entered into regarding Clyde E. Williams, that he be deemed to have been called and sworn and testified in accordance with the stipulation.

The Court: Any objection to the offer of it in [198] evidence?

Mr. Hughes: No, your Honor.

The Court: Received in evidence as Defendant's Exhibit C in both cases.

The clerk will file it and mark it in evidence.

(The exhibit referred to, marked Defendant's Exhibit C in both case No. 20301 and 20302, was received in evidence.) [199]

Mr. Murphey: I will call Mrs. Lampert. I think I reserved cross examination of her.

The Court: Very well.

BLANCHE LAMPERT

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

The Court: Will you state your name again, please?

The Witness: Blanche Lampert.

The Court: You have been sworn?

The Witness: I have.

The Court: Be seated.

Mr. Murphey: Would the clerk please show the witness Exhibit No. 8 and Exhibit No. 5, respectively, the sworn statement of Mrs. Lampert?

The Clerk: And the photograph?

Mr. Murphey: Just the sworn statement, Mr. Clerk, please.

(Whereupon, the exhibit was placed before the witness.) [229]

Cross Examination

Q. (By Mr. Murphey): You have before you a sworn statement, Mrs. Lampert. Was that taken on November 2, 1955, at Phoenix; I mean at Scottsdale? A. Yes.

The Court: Has this been marked?

The Clerk: Yes, your Honor. It is in evidence.

The Court: Well, refer to it by exhibit number and I will know what you are speaking of.

(Testimony of Blanche Lampert.)

Mr. Murphey: Yes, sir.

The Court: Exhibit 5, is it?

Mr. Anson: 5 in the Lyons case, your Honor, and 8 in the Meyers case.

The Court: Very well.

Q. (By Mr. Murphey): Do you recall that that statement was taken on November 2nd before a court reporter? A. Yes.

Q. And after it was taken did you read it?

A. I did.

Q. Did you swear to it before that court reporter? A. I did.

Q. And immediately prior to that, say, on November 1st, did you have a telephone conversation with me? [230]

Mr. Hughes: I offer it in evidence, your Honor.

The Court: Received as Exhibit No. 8.

Mr. Anson: Exhibit No. 8, your Honor?

The Court: Exhibit No. 8, is it not, Mr. Clerk?

The Clerk: Exhibit No. 8 in Case No. 20302.

The Court: Do you offer it in both cases?

Mr. Hughes: Yes, your Honor.

The Court: It will be Exhibit 8 in the Meyers case, and Exhibit 4—would it be—in the Lyons case?

The Clerk: Exhibit No. 5.

The Court: Yes, Exhibit No. 5 in the Lyons case.

(The exhibit was marked Plaintiff Meyers'

Exhibit 8 and Plaintiff Lyons' Exhibit 5 for identification, and was received in evidence.)

Q. (By Mr. Hughes): Now, what is contained

(Testimony of Blanche Lampert.)

in that statement is everything you ever said on this matter?

Mr. Murphey: Just a minute, counsel. That is calling for the conclusion of the witness.

The Court: That isn't fair. She hasn't even had a chance to read it. It is unfair to ask her to make a comparison, anyway. You may examine her about what she said. She has testified to it, hasn't she?

When you say that you told Mrs. Gilliland, do you mean that you made it in the statement? [231]

A. I did.

Q. Were there any persons present that you can recall at your end? A. No.

Q. Would you proceed to tell the court the substance of that telephone conversation?

A. You——

Mr. Hughes: I object, your Honor. The statement is in and it is an exhibit. I don't know what materiality her conversation with the defense counsel has.

The Court: What is the purpose of it?

Mr. Murphey: Nothing more than to show corroboration of Mrs. Gilliland's testimony that she did not discuss the matter with Mrs. Lampert; but to show that Mrs. Gilliland merely told Mrs. Lampert that I would call her and arrange to take this. And then, also, there was an additional subject matter I would like to interrogate her on.

The Court: In this telephone conversation?

Mr. Murphey: Yes, sir.

(Testimony of Blanche Lampert.)

The Court: Is this a foundation for impeachment?

Mr. Murphey: No; additional information.

The Court: Very well. Proceed. You may answer.

The Witness: May I have the question again, please?

Q. (By Mr. Murphey): You said you had a telephone conversation with me [232] the day before that was taken. That would make it November 1, 1955. Do you recall that conversation, what was said?

A. You called me up and asked me if I would give a statement or a deposition, whatever you call it, that Mrs. Gilliland had told you that I had some information that you wanted to know.

Q. Now, is there correctly set forth in that sworn statement the substance of what you said to Mr. and Mrs. Gilliland, or Mrs. Gilliland, myself, on that occasion? A. Yes.

Q. Now, did you tell me that Faye Lyons——

Mr. Hughes: I object, your Honor, without a foundation. If he wants to know what she saw or what she observed, why, that is something else.

Mr. Murphey: This doesn't go as to the truth, necessarily, your Honor.

The Court: Then don't lead her.

Mr. Murphey: Well, it is cross examination.

Mr. Hughes: It may be cross examination, your Honor; but what she told Mr. Murphey as to the portion that Mrs. Gilliland told her that he was

(Testimony of Blanche Lampert.)

going to call, and that sort of thing may be material and relevant, but what he is asking now is about Faye Lyons or some such thing as that. If she wants to know what she observed in regard to Faye Lyons or Mrs. Meyers or anybody else I think you should ask [233] her what she observed and not what she told him over the telephone.

Mr. Anson: One of the issues in this case is whether Mrs. Gilliland acted with reasonable cause when she filed her cross-complaint. The information on which she acted is material to the privilege she claims.

The Court: There is no question about it. Is it offered for that purpose?

Mr. Murphey: Yes, sir.

The Court: Very well. Answer the question.

Mr. Hughes: If your Honor please, Mrs. Gilliland has testified that the only information she received in regard to that matter was what she received from Mrs. Lampert——

The Court: And her husband.

Mr. Hughes: ——and Mrs. Lampert's statement is in the record of what she had to say in regard to that.

The Court: Perhaps she didn't put it all on the statement. I don't know. We will see. Proceed. You may cross-examine.

I had overlooked the fact for the moment that this was cross examination.

Q. (By Mr. Murphey): Did you make any statement to me, in substance or effect, that Faye Lyons

(Testimony of Blanche Lampert.)

and Mr. Gilliland were going to Las Vegas? [234]

A. Yes.

Q. And what did you tell me in that regard, if you recall?

A. I don't remember just what I told you about them going to Las Vegas. I remember about when he and Ann Meyers went to Vegas, but I don't remember about Faye Lyons.

Q. Now, on the occasion that you have mentioned in your statement about Mr. Gilliland and Faye Lyons getting into an argument—did you hear that argument?

A. I remember about that, yes. It was the last night——

Mr. Hughes: I would like to know, your Honor, the date, time, place, and who was present—the foundation.

Mr. Anson: This is cross examination, your Honor.

The Court: Let's have it so we will know. We can follow the testimony better, anyhow.

The Witness: Mr. Gilliland——

The Court: Just a moment. Let's find out where it was and who was there.

Q. (By Mr. Murphey): Do you remember when it was?

A. It was the last day or the next to the last day that Faye was out at Scottsdale before she left. And she didn't go to Vegas. She went home. Mr. Gilliland asked me—they had been having trouble and Faye said she could not have anything more to do

(Testimony of Blanche Lampert.)

with him, that he was drinking too [235] much. So Mr. Gilliland asked me if I would go up and babysit so he and Faye could talk things over.

So I went up and babysat with the little boy. And pretty soon, not too late, because she wasn't gone very long, Faye came home.

Q. Where was this?

A. At the Paradise Guest Ranch. And Mr. Gilliland brought her home. And I said to her, "Where is the Dodge?"

She said, "He took it away from me. We had a fight." She said, "He slapped me and I threw a glass at him."

I went back down to Mr. Gilliland's home and he told me the same thing. I swept up the glass.

But before I went I said to Faye, "Are you still going to Vegas?"

"No," she says, "I am going back home to Miami."

Q. All right. Now, on another occasion was there an argument? Did an argument develop while there were guests at the house?

A. Yes. The night that Judge and Mrs. Blake, Phil Kent and his wife and Faye and Mr. Gilliland—we had a steak dinner there at Mr. Gilliland's home. Mr. Blake and I cooked the dinner, and Mr. Gilliland got pretty—well, he drank quite a bit and got very obnoxious. So Faye said to him, "Take me home." [236]

So he took her up to the Paradise Valley Guest Ranch and he didn't come back. And the next morning I took my husband to work when he was

(Testimony of Blanche Lampert.)

a gardener there, and Mr. Gilliland, about a quarter to 8:00, came out of her apartment, and his car was still sitting in front of her apartment. And Lee was there—that is, Mrs. Silverman—and she really gave Ray the dickens for staying up there.

Q. Now, during the period that Ann Meyers was there at Scottsdale did you ever see Mr. Gilliland and Ann Meyers in her bedroom? A. Yes.

Q. And on how many occasions?

A. Several occasions.

Q. How was she dressed?

A. Very scantily.

Q. What did she have on?

A. One time a thin gown. Another time her slip.

Q. And where was Mr. Gilliland?

A. He was laying on the bed.

Q. What did he have on?

A. One time his shorts. Another time his pajama tops.

Q. When was this with relation to the time of day that you observed them there?

A. Well, one time my husband and I came home from work and we came into the kitchen, and there is an arch between [237] the kitchen—you can look straight into the bedroom, and they were laying on the bed then, and they got up and closed the door real quick like.

Mr. Hughes: Your Honor, I move that that be stricken, unless the date is established for that.

Q. (By Mr. Murphey): Can you establish a specific date that you observed that?

(Testimony of Blanche Lampert.)

A. I couldn't just say exactly the date. It was between—after I came back from my vacation, it was between then and the time she left. I don't remember those dates. I wasn't keeping track of them.

The Court: The time who left?

The Witness: Mrs. Meyers.

The Court: When did you come back from your vacation?

The Witness: The 15th of June.

The Court: What year?

The Witness: 1955.

The Court: What time in June did Mrs. Meyers leave?

The Witness: She left along in August.

The Court: The same year?

The Witness: The same year, yes.

Mr. Hughes: If your Honor, I would like the other [238] question as to when she arrived, at least to get it down within a month or so.

The Court: When who arrived?

Mr. Hughes: Mrs. Meyers.

The Court: Well, the witness has said it was after she came back from her vacation, which was about July 15th. Is that it?

The Witness: Mrs. Meyers?

The Court: No. When you came back from your vacation.

The Witness: Yes, it was July 15th when I came back.

(Testimony of Blanche Lampert.)

The Court: Between that time and the time Mrs. Meyers departed, and that was around the 1st of August?

The Witness: When we came back from our vacation Mrs. Lyons was still there, and then she left and Mrs. Meyers came.

Q. (By Mr. Murphey): Did you ever observe Mr. Gilliland kissing Faye Lyons?

A. Once or twice.

Q. When?

A. In the kitchen out by the bar when we were all sitting out there.

Q. Where was this? What house? [239]

A. At Mr. Gilliland's house.

Q. Was anybody else present?

A. My husband and I.

Q. Is that the same on both occasions?

A. Yes.

Q. Did Mr. Gilliland ever make any statement to you concerning his sexual inclinations with women? A. He just said that he——

Q. Yes or no, please. A. Yes.

Q. When was this?

A. One time when my husband and him was discussing women and being with women, and things.

Q. And what period, about what month would you say?

A. Well, it was—well, it was the same time I was living there, from July—or, during July and August, when I was there.

Q. Where did this conversation take place?

(Testimony of Blanche Lampert.)

A. Mr. Gilliland's home.

Q. And who else was present, if anybody?

A. My husband and myself and Mr. Gilliland.

Q. All right. What did Mr. Gilliland say?

A. He said he would not have anything to do with any women, play around with them or travel with them unless they come through the way he wanted them to. [240]

Q. Now, did you——

Mr. Hughes: Your Honor, I am going to move that that be stricken unless he establishes a substantial foundation as to who was present, the time, date and place.

The Court: You may cross examine on it or re-examine on it. The motion is denied.

Q. (By Mr. Murphey): Did you ever hear Mr. Frank Kerwin make any statement about selling Mrs. Gilliland any property——

Mr. Hughes: I object, your Honor.

Mr. Murphey: Impeachment.

The Court: Wait until the question is finished. Don't interrupt any more.

Mr. Hughes: Yes, sir.

The Court: Finish the question.

Q. (By Mr. Murphey): ——selling property to Mrs. Gilliland near Scottsdale in connection with Mr. Gilliland and Mr. Kerwin? A. Yes.

The Court: Just a moment. Did you have an objection?

Mr. Hughes: It is usually too late, your Honor, unless I stand up in the middle of a question.

(Testimony of Blanche Lampert.)

I move that it be stricken.

The Court: The motion is granted. [241]

Mr. Hughes: There has been no foundation laid.

The Court: The objection is sustained.

Q. (By Mr. Murphey): Did you ever hear a conversation between Mr. Gilliland and Mr. Kerwin on the subject matter of selling Mrs. Gilliland a hotel—excuse me—a restaurant. Just a minute.—a country club.

Mr. Hughes: I object, your Honor. There has been no foundation laid as to time, place,—

Mr. Murphey: I am merely asking as to the subject matter, yes or no.

The Court: What is the purpose of it?

Mr. Murphey: For the purpose of impeachment of Mr. Frank Kerwin, who testified he never did make an effort to sell her any property.

The Court: That's a collateral matter. Sustained.

Mr. Hughes: Thank you, your Honor.

Mr. Murphey: You may examine.

Redirect Examination

Q. (By Mr. Hughes): Mrs. Lampert, isn't it true that Mrs. Gilliland talked to you and told you her attorney would call you?

A. Mr. Murphey called me and said Mrs. Gilliland had told to call me. [242]

Q. Had you talked to Mrs. Gilliland before you talked to Mr. Murphey?

A. I had talked to her, but not on this subject. I had talked to Mrs. Gilliland; that is, just casually.

(Testimony of Blanche Lampert.)

Q. And you talked to her casually and she called her attorney and told her attorney to call you, that you had information, is that correct?

A. That's right.

Q. Mrs. Lampert, isn't it true that Mrs. Lyons was away from the premises—that you were away from the premises from May 15th to June 15, 1955?

A. That's right.

Q. And Mrs. Lyons was not there when you came back?

A. Mrs. Lyons came back after I came back. She was still there when I left.

Q. But a week later she came back, is that correct?

A. No. I——

Q. Wasn't it a week after you got back that she came back?

A. I don't know exactly, just exactly how long it was before she came back.

Q. How many times did you sit with Dan?

A. Three.

Q. From the time Mrs. Lyons was there from—well, until she left, you sat with Dan three times?

A. Three times.

Q. Wasn't one of those times immediately before Mrs. Lyons left, and you called her up and asked her to please come over and do something with Mr. Gilliland because he was intoxicated?

A. I don't remember whether it was one of those times or not.

Q. Wasn't that the time when the glasses were broke, and the rest, because he was intoxicated and

(Testimony of Blanche Lampert.)

you called her to come over and talked with him and take care of him?

A. Mr. Gilliland asked me to go up and sit that night. That is not true. Mr. Gilliland asked me to goup because he wanted to talk things over with her.

Q. And wasn't she cooking dinner when you went up there and she went down and you sat with the child for about 15 or 20 minutes and she came back and finished cooking dinner and finished feeding her child?

A. She did not. The boy went to bed before she came home.

Q. You spoke of these conversations. Isn't it true that Ray Gilliland never discussed the subject of sex with you?

A. He did with my husband.

Q. How did you know about it?

A. I overheard. It was in the kitchen where they were. [244]

Q. What was the date?

A. I don't know the exact date. It was when we were living there. I can tell you the month, but I can't tell you the exact date. I wasn't keeping track.

The Court: Give us the month and the year.

The Witness: It was between May 1st and May 15th and June 15th and September the 30th of the year 1955.

Q. (By Mr. Hughes): Was Faye Lyons in Scottsdale, Arizona, after July 7, 1955, to your knowledge?

(Testimony of Blanche Lampert.)

A. I don't know whether she was there at that date, or Mrs. Meyers.

The Court: You mean at any time after that date?

Mr. Hughes: Any time after that date, to your knowledge.

The Witness: I don't know. I don't know the exact date she left. I don't know.

The Court: The question was, was Mr. Lyons there at any time after July 7th? Is that it?

Mr. Hughes: July 7th, yes, sir.

The Court: 1955.

The Witness: I don't know.

The Court: Didn't you just tell us a few minutes ago that after you came back from your vacation in the middle of July—— [245]

The Witness: The 15th of June.

The Court: I am sorry. I misunderstood. Was it June?

The Witness: The 15th of June.

Mr. Hughes: I think the record will show that she stated July 15th.

The Court: If you stated July 15th did you mean June?

The Witness: I meant June.

Mr. Anson: My notes show that she stated June 15, 1955.

The Court: Well, the reporter's notes will show it.

The Witness: I meant June, if I said July, because that is when I took my vacation.

(Testimony of Blanche Lampert.)

The Court: Anything further?

Q. (By Mr. Hughes): Where is Mrs. Gilliland's house located?

The Court: With reference to what?

Q. (By Mr. Hughes): In Scottsdale, Arizona.

A. Sajuaro Road.

Q. And you work for Mrs. Winchell?

A. That's right.

Q. You are a housekeeper for Mrs. Winchell?

A. That's right.

Q. Are you her secretary? [246]

A. What do you mean, am I her secretary?

Q. Are you the secretary for Mrs. Winchell?

A. I do nearly all her buying and household things and pay a lot of her bills and write checks—if that is what you mean—and help take care of things like that. It that what you mean? If you mean does she dictate letters to me, the answer is no.

Q. Mrs. Lampert, where is Mr. Winchell's house in reference to Mr. Gilliland's house in Scottsdale?

A. Mrs. Winchell's house is on Yucca Road, and that is up—let's see, now. How are those directions? That is west or northwest of Mrs. Gilliland's house.

Q. Isn't Mrs. Winchell's house right directly behind Mrs. Gilliland's house in Scottsdale?

A. No.

Q. Isn't it true that you can stand in the front yard of the Winchell house and look directly into the back yard of the Gilliland house?

A. No. Mrs. Winchell's front yard faces the

(Testimony of Blanche Lampert.)

mountains. There is just one new house there. It doesn't face Mrs. Gilliland's house.

Q. If you stood on the back porch of Mrs. Winchell's house isn't it true you can look right into the back yard of Mrs. Gilliland's home?

A. You can see the garage. The garage belongs to the [247] house. You can't see into Mrs. Gilliland's house because that double garage and the two-room apartments are there. You can just see one end, a little bit of one end of her house.

Q. Isn't it true that Mr. Gilliland's house is located about four miles away from Mrs. Gilliland's house in Scottsdale?

A. No, it isn't that far from Mrs. Gilliland's house to Scottsdale.

Q. How far would you say it was away?

A. Oh, I wouldn't know just how far it is way. But it isn't that far, because it isn't that far into Scottsdale.

The Court: Would it be two miles?

The Witness: I would say maybe two, maybe two and a half. Not more than two, I wouldn't think.

The Court: Anything further?

Mr. Hughes: If your Honor please, we would like to move, in regard to Mr. Therrell's testimony for the admission——

The Court: Is there anything further of this witness?

Mr. Hughes: No, your Honor. Pardon me.

The Court: You may step down, Mrs. Lampert.

(Witness excused.) [248]

Mr. Hughes: We would like to move for the admission into evidence of the deposition of the Silvermans in refutation of this witness's testimony.

The Court: Any objection?

Mr. Murphey: No objection to the depositions.

The Court: Is that a single volume or——

Mr. Hughes: I think it is a single volume. That is in the Lyons case.

The Court: I assume it's stipulated that they are unavailable.

Mr. Murphey: I will stipulate that they reside in Phoenix, Arizona, and are not within the processes of the court, and not available.

The Court: Are they offered as a single volume?

Mr. Murphey: There are two volumes. One is Ray Silverman and the other one is Lenore Silverman.

The Court: The Ray Silverman deposition will be marked in evidence, Mr. Clerk, as Plaintiff Lyons' next exhibit in order.

The Clerk: Plaintiff Lyons' Exhibit 10, your Honor.

The Court: The other deposition—what is the name of it? What is the name of the other Silverman? Ray Silverman is Exhibit 10 in the Lyons case. [249]

The Clerk: Yes, your Honor.

The Court: All right. What is the name of the next Silverman?

The Clerk: Lenore.

The Court: Her deposition will be marked in evidence as Plaintiff Lyons' Exhibit 11.

(The exhibits referred to were marked Plaintiff's Exhibits 10 and 11 in Case No. 20301, and received in evidence.)

The Court: What next do you have?

Mr. Hughes: I would like to move for the admission of the Teich deposition in the Lyons matter.

The Court: Any objection?

Mr. Murphey: No objection, your Honor.

The Court: Is it stipulated that the witness is unavailable?

Mr. Murphey: That's right.

The Court: Received in evidence as Lyons' Exhibit 12. How do you spell the name of the last person?

Mr. Hughes: T-e-i-c-h, your Honor.

The Court: Do you have it, Mr. Clerk?

The Clerk: Yes, I do, sir.

The Court: File it in evidence.

(The exhibit referred to was marked Plaintiff's Exhibit 12 in Case No. 20301, and was received in evidence.) [250]

* * * * *

The Court: What is the next deposition?

Mr. Hughes: The next one is the deposition of Mary Elizabeth Bailey, medical records, librarian of the Visalia Municipal Hospital.

The Court: Any objection?

Mr. Murphey: I object as being incompetent, irrelevant and immaterial, no foundation laid.

The Court: Wherein is the foundation lacking?

Unavailability?

Mr. Hughes: Unavailability.

The Court: Wherein is the foundation specified to be lacking? [253]

Mr. Murphey: In that she is within the subpoena distance, as I understand it, of this court.

The Court: I will have to sustain the objection until there can be a showing of her unavailability.

Are you offering the Bailey deposition in the Meyer case?

Mr. Hughes: Both cases, your Honor.

The Clerk: I don't seem to have that one, either, your Honor.

The Court: Very well. You can't mark them unless you have them. If you find the Bailey deposition mark it in both cases for identification, only, as the next exhibit in order. And that, according to my notes, is Exhibit 13 in the Lyons case and Exhibit 15 in the Meyers case.

I suggest you check with the clerk if you think those depositions should be on file, and see what has happened to them.

You might check with Judge Hall's clerk, Mr. Clerk.

The Clerk: Yes, I shall.

The Court: Very well. Your next witness?

Mr. Anson: I call Mr. William L. Murphey, your Honor. [254]

* * * * *

ELSINORE MACHRIS GILLILAND

called as a witness in her own behalf, having been previously duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name for the record?

The Witness: Elsinore Machris Gilliland.

The Clerk: And you have been heretofore sworn?

The Witness: Yes, I have been. Thank you.

Direct Examination

Mr. Murphey: May the clerk show the witness Exhibit 3 in the Lyons case?

(Whereupon, the exhibit was placed before the witness.)

Q. (By Mr. Murphey): Mrs. Gilliland, would you examine that document, page 4, lines 1 to 4, if you will, please?

The Court: Is that a copy of the cross-complaint?

Mr. Murphey: That's right, your Honor.

Just the first four lines, page 4.

The Witness: Yes, I have read them. [256]

The Court: Suppose you read them out loud to us so we know what you are talking about.

The Witness: You want me to read them out loud?

The Court: Yes.

The Witness: "On July 20, 1954, and days immediately subsequent thereto, while cross-complainant and cross-defendant were on their honeymoon at

(Testimony of Elsinore Machris Gilliland.)

Lake Tahoe, the cross-defendant associated with and kept Virginia Brown and Marilyn Lee.”

Any more?

Mr. Murphey: No. That's it.

Q. (By Mr. Murphey): Now, does that refresh your recollection as to any other information you had at the time that you filed this cross-complaint? Does that refresh your recollection?

A. I don't understand the question.

Q. What was the source of the information from which that allegation was made? Did anybody tell you anything about these two women?

A. Yes.

Q. Who was the party?

A. Mr. James Roach.

Q. And before you filed this complaint, did you have a conversation with Mr. Roach?

Mr. Hughes: I object, your Honor. I don't know [257] where Virginia Brown or Marilyn Lee enters into the issue in this matter.

Mr. Murphey: Just simply this, that the man's propensities——

The Court: Is this on the question of reasonable cause to believe?

Mr. Murphey: Yes, your Honor.

The Court: Very well. Overruled. You may answer.

The Witness: Did I have a conversation with Mr. Roach? Yes.

Q. (By Mr. Murphey): Where did this conversation take place?

(Testimony of Elsinore Machris Gilliland.)

A. At Lake Tahoe, at our home at Lake Tahoe.

Q. Who was present?

A. Mrs. Roach, James and myself.

Q. And what did Mr. Roach tell you?

A. He told me——

Mr. Hughes: I object, your Honor. There has been no time fixed that this conversation took place.

The Court: Fix the time and place.

Q. (By Mr. Murphey): Now, when with relation to the filing of your cross-complaint did you have this conversation with Mr. Roach as to what had happened at Lake Tahoe?

Mr. Murphey: Will you read it, please? [258]

The Witness: What was that?

Mr. Murphey: The reporter will read you the question.

The Court: Why don't you just ask her when it took place? Isn't that enough?

Mr. Murphey: All right.

Q. When did you have this conversation with Mr. Roach?

A. I had it almost immediately after this affair.

The Court: We don't know when it was.

The Witness: It was in July.

The Court: Of what year?

The Witness: 1954.

Q. (By Mr. Murphey): What did Mr. Roach tell you?

A. He told me that every morning on the way to the golf course that Mr. Gilliland would stop at this home where Miss Virginia Lee lived in, and Miss

(Testimony of Elsinore Machris Gilliland.)

Brown, and stop to see them. And he would go to their bedrooms and stay there for a while and come out.

Q. Did he make any statement at all as to any moneys being paid to these women?

A. Yes. He paid them a great deal of money.

Q. Now, do you recall an incident which happened on January 2, 1955——

A. Yes. [259]

Q. ——at Scottsdale?

A. It happened at Phoenix, Arizona, at the Westward Ho Hotel. Oh, I beg your pardon. The incident was the day after New Year's, I believe. Mr. Maxwell Dorn, yourself and myself drove out to Mr. Gilliland's home. I did not know where he lived. He got a hide-away, and I didn't know it. Mr. Dorn explained and showed us where Mr. Gilliland was living.

We got into the house. You and Mr. Dorn went in. You went to the door and he admitted you. He didn't know I was in the car. And I followed shortly afterward. And we had a conversation. There had been a woman there. There was a cigarette burning with lipstick on the cigarette and a coffee cup with lipstick around it. So we got into a small argument. I left the house. And you and Mr. Dorn saw this woman in the bedroom window, and you told me so. You said, "There is a woman in that bedroom." And I went back to that room——

Mr. Hughes: I object, your Honor, and move that it be stricken, unless it is confined to what she saw and heard.

(Testimony of Elsinore Machris Gilliland.)

The Court: Don't interrupt the witness. Wait until the witness completes her answer. If you wish to move to strike any portion of it, you may do so.

The Witness: So I returned to the house and I [260] said, "Ray, there is a woman in your room." I tried the doors. The doors were locked from the inside.

I said, "Ray, there's a woman in your room."

And he said, "So what of it?"

Q. (By Mr. Murphey): Is that all of that incident? A. No, that isn't all.

Q. I meant on the statement.

A. On the statement, no. There was — he had taken some articles from my home. They had disappeared from my house. Some of my wedding gifts, and I found them in the closet and I took them out — things that he had taken away from me. And I think that is all.

Mr. Murphey: All right. Any motion?

Mr. Hughes: Your Honor, I move to strike the entire testimony in response to the last question in that it is non responsive in that she relates a series of incidents that she heard from somebody, or somebody else told her; that there is not a particle that she said saw herself, except possibly about the wedding gifts that she found. It was either Mr. Dorn told her or Mr. Murphey told her, or somebody else told her.

The Court: Well, I assume that that is offered not to prove the truth of what was told her, but what was told her, the fact, the oral fact. [261]

(Testimony of Elsinore Machris Gilliland.)

Mr. Murphey: That is correct. And her frame of mind that has to do with the defense on the second count.

The Court: The motion is denied.

Q. (By Mr. Murphey): Now, following this did you have a conversation with me on the subject matter of filing this cross-complaint, or the cross-complaint which you have before you?

A. Yes.

Q. Where did this conversation take place?

A. At the Westward Ho Hotel in Phoenix.

Q. And would you tell the court the substance of that conversation?

Oh, just a minute. Was anybody else present?

A. I believe Milton Cohen and Patti Karger were present.

Q. I better identify the subject matter.

Mrs. Gilliland, did you have any conversation with me as to whether or not you should file a cross-complaint and any liability in connection with its filing?

Mr. Hughes: Your Honor, I am going to object because of the fact that this is counsel's own witness and he is leading her. And the question is, did we ever discuss filing a cross-complaint. What time, what place and what was discussed?

The Court: Overruled. You may answer. [262]

The Witness: I don't quite understand your question.

Q. (By Mr. Murphey): Did you have a conversation with me about whether or not you could or

(Testimony of Elsinore Machris Gilliland.)

should file a cross-complaint in this action for divorce? A. I believe so.

Q. Where did this conversation take place?

A. I think at the Westward Ho Hotel in Phoenix.

Q. Who was present?

A. Wasn't it Patti Karger and Cohen?

Q. All right. What was said?

A. Well——

Mr. Hughes: I object, your Honor. What was the date?

The Witness: What was said? Mr. Milton Cohen offered me a million dollars to make up with——

Mr. Hughes: Your Honor——

The Court: I instructed you not to interrupt the witness.

Mr. Hughes: Pardon me, your Honor.

The Court: You can cross examine on dates. She has told us about when it was.

Fix the date and we will have a great deal less trouble. Time, place and parties present. [263]

Mr. Murphey: All right.

Q. When did this take place with relation to the date that——

A. The 2nd of January, 1955.

Q. All right. Was there a discussion on that subject matter then, as to whether or not you should file this cross-complaint for divorce? A. Yes.

Q. All right. At the Westward Ho in the presence of Milton Cohen and Patti Karger.

The Court: What is your question?

(Testimony of Elsinore Machris Gilliland.)

Q. (By Mr. Murphey): Would you relate what the conversation was about filing this cross-complaint?

The Court: Do you remember the conversation?

The Witness: I don't remember it, no.

The Court: Perhaps you can suggest—that is a pretty broad topic, filing a cross-complaint.

Q. (By Mr. Murphey): Did I give you any advice as to whether or not there were sufficient facts to warrant you charging these women with adultery?

A. Yes.

Q. Where did this conversation take place, if you recall? [264]

A. I don't recall.

Q. Do you know about when it was?

A. It was January 1955.

Q. Was that before the action was filed in September 1955? Just to refresh your memory, the original complaint by Mr. Gilliland was filed in September 1955, Mrs. Gilliland——

Mr. Anson: October 21st.

Mr. Murphey: October 21st.

The Court: January 1955 or January 1956? When was the cross-complaint filed?

Mr. Anson: November 29, 1955.

Mr. Murphey: November 29, 1955.

The Witness: I can't remember dates.

Q. (By Mr. Murphey): Was it just before the cross-complaint was filed?

A. I don't remember.

Q. Now, Mrs. Gilliland, at the time you verified this cross-complaint—you have it before you if you

(Testimony of Elsinore Machris Gilliland.)

care to examine it. You check it, the last sheet. I think you will find you swore to it before Mr. Anson on a certain date.

The Court: Is that Exhibit 3? Do you find your signature on it?

The Witness: I signed it.

The Court: Do you remember when you signed it?

The Witness: 30th day of November, 1955. [265]

The Court: Do you remember the occasion when you signed it?

The Witness: I don't remember. I see my signature, but I do not remember the date, your Honor.

The Court: I didn't ask you the date. I asked you if you remembered the occasion.

The Witness: There have been so many occasions.

The Court: Proceed.

Q. (By Mr. Murphey): Well, the time that you verified this cross-complaint, Mrs. Gilliland, did you bear Ann Meyers or Faye Lyons any ill will?

A. No, I did not.

Q. Did you have any feeling of spite against either of them? A. No.

Q. Did you in your mind bear any vindictive enmity towards either of them? A. No.

Q. In filing this cross-complaint were you actuated by any wish or desire or design or purpose to injure Ann Meyers or Faye Lyons? A. No.

Q. Did you honestly believe the truth of the allegations of that cross-complaint? [266]

(Testimony of Elsinore Machris Gilliland.)

A. Yes.

Mr. Murphey: One other thing.

Q. Do you recall that I showed you a registration certificate of "Ray Gilliland and Family" at the Colonial House at Las Vegas? A. Yes.

Mr. Murphey: Will you please mark this for identification?

Would you show those to the witness? Please have them identified first, Mr. Clerk.

The Court: Have they been marked?

Mr. Murphey: Yes, marked for identification.

The Clerk: Defendant's Exhibit E, your Honor, in both cases.

The Court: Very well.

(The document referred to was marked Defendant's Exhibit E for identification in the Faye Lyons and Ann Meyers cases respectively.)

Q. (By Mr. Murphey): Mrs. Gilliland, before you signed this cross-complaint, verified it, had you seen those registrations and the bill which are now before you? A. I believe I did.

Q. Did I show them to you?

A. No. I don't know whether you did or not. I found [267] them in Mr. Gilliland's suitcase.

Q. You did? A. Yes, sir.

Q. Well, that might have been the receipt——

A. The receipt.

Q. ——but the registration that is there.

A. Oh. The receipts I found in his case. Also a

(Testimony of Elsinore Machris Gilliland.)

receipt for the car that he had bought for Miss Faye Lyons. I mean the first payment.

Q. Isn't it the fact that I showed you that registration card there, the one bearing "Ray Gilliland and Family"? A. I believe so.

Q. You had that information at the time that you verified this complaint, did you not?

A. Yes, sir. [268]

* * * * *

Q. (By Mr. Murphey): Other than the filing of this cross-complaint in that action down there did you make any statement anywhere that Ray committed adultery with either of these women?

A. No, I did not.

Q. Did you cause any publication to be made of any article, in substance or effect, that Ray committed adultery with either of these women?

A. No.

Q. Did you ever have an interview with any reporters of the Riverside Enterprise in which you asked that the case be published?

A. No, I did not.

Mr. Murphey: Thank you, your Honor. No further questions.

The Court: We will take a recess at this time until tomorrow morning at 10:00 o'clock. You will be excused until that time.

(Witness temporarily excused.) [270]

The Court: Gentlemen, before we adjourn, on this question of admissibility of the deceased Ray Gilliland, the statement allegedly made as to his

condition to the nurse by the witness Ida Barr, you may wish to examine the cases over the recess which are collected at 64 ALA at 557.

Especially you may wish to examine the case of Kennedy against Rochester, 130 N. Y. 654, 29 N. E. 141. And another New York case Tromblee against North American Accident Insurance Company, 173 Appellate Division 174, 158 N. Y. Supp. 1014, affirmed without opinion 226 N. Y. 615.

In that latter case I understand a declaration was admitted where the declarant was dead.

These cases usually arise where there is an attempt to get into evidence a hearsay declaration of subjective conditions such as pain where a man says, "Oh, my arm hurts," or "My back hurts," or something like that.

This problem here is a different situation, of course. Of course, it's a declaration of a subjective condition which carries the elements of trustworthiness because of the very nature of it, that a man wouldn't likely make it unless it was so. Added to that is the circumstance that the declarant is now dead. Opposed to that is the vicious circumstance that it is made in connection with [271] this lawsuit and subject to that fabrication. It's of a self-serving character with respect to this lawsuit; not from the point of view of the declarant, but from the point of view of the circumstances under which it was made.

It poses a very interesting question as to the admissibility of it, and I would be glad to have you research those matters.

Mr. Anson: Could I remind your Honor that we filed our points and authorities, and on page 6 we relied on *Evans v. Evans*, and *Wilson v. Wilson*. And I think it might clarify our position in this matter if we did not offer those declarations as truth of the contents, but rather to show the state of mind of the declarant at that time as part of the circumstances under which the suspicious circumstances should be judged. And this is to show not the truth——

The Court: You aren't offering it. The plaintiff is offering the evidence that I am referring to. The plaintiff is offering the evidence as to Ray Gilliland's statement to the nurse of his subjective condition. That is what I am referring to.

Mr. Anson: I am sorry. Those were offered as proof and——

The Court: Well, yes. They are in the same category. I take it, as offering the statement of a dead man normally made to his physician as to what his subjective [272] symptoms were.

Mr. Anson: We feel that since they are offered to prove their truth they are hearsay.

The Court: Here they were made to a layman, in effect, and I have mentioned the considerations that I am thinking about. And I would like to have you do some research on it.

Did you get those citations?

Mr. Hughes: Yes, your Honor.

The Court: There is some discussion of the general question in the American Law Institute, "Basic

problems of evidence, Volume II" by Edmond M. Morgan, pages 285, and so forth.

We will take the recess now until tomorrow morning at 10:00 o'clock.

The court will adjourn.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m., of the following day, Thursday, June 5, 1958.) [273]

* * * * *

Mr. Murphey: In regard to that medical deposition, your Honor, could I make a motion on that at this time?

The Court: Which deposition?

Mr. Murphey: Mary Elizabeth Bailey, medical librarian of the Visalia Municipal Hospital.

The Court: Yes.

Mr. Murphey: Your Honor, for the information of counsel, I have copies of the depositions of J. R. Edwards and Allen Moffatt, which I believe were missing yesterday.

The Court: Did you find the originals, Mr. Clerk?

The Clerk: No. I will continue my search, however. I haven't yet located them.

The Court: Well, they may never have been filed. Who had the originals?

The Clerk: Our docket shows that they have been filed. [277]

The Court: They have been filed?

The Clerk: Yes.

The Court: Well, is there any objection to re-

ceiving the copies in lieu of the originals pending the clerk's finding of the originals?

Mr. Hughes: No objection, your Honor. But the same situation exists, your Honor, in the case of the medical records of the Visalia Municipal Hospital. And I have a letter, a copy of the letter of transmittal from the reporter.

The Court: There was an objection to that Bailey deposition, was there not?

Mr. Hughes: Yes, your Honor.

The Court: There was no foundation laid for the use of it.

Mr. Hughes: No, your Honor. The objection was based on the fact that the witness was available from within this district. That was the objection.

The Court: Yes. That's the foundation objection.

Mr. Hughes: Our motion is based on Rule 26(3) in that notice was duly given to counsel for the defendant; that no objection was made to the notice for the taking of the deposition; that the defendant's counsel ordered a copy from the reporter of the deposition; that the records consist only of the medical records and hospital records of the Visalia Municipal Hospital for December 1950 and [278] January 1951 as to Ray C. Gilliland's orchiectomy and that they were kept in the regular course of the hospital's business in the operation of the same; that these records are over five years old; that they are reliable and that they are relevant.

The Court: The point now is, is there any showing that the witness shouldn't have been produced.

That is the question, isn't it? We reach the other questions when we see the deposition.

Mr. Hughes: Yes, your Honor. Rule 26(3) provides that if the witness is without a hundred miles from the place where the court is sitting that a deposition may be taken of the witness and submitted into evidence. The witness in this instance is located in Visalia, California, over 187 miles from this courtroom. It would be a manifest injustice to exclude the submission of this deposition in that the defendant has had an opportunity to cross examine, if he so desired. The defendant has had an opportunity to object to the taking of the deposition if he so desired. And none of these objections have been taken at any time through the proceedings. And pursuant to Rule 26(3), Section (D) of that rule, states the deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is at a greater distance than 100 miles from the place of trial or hearing, [279] "or" — and that's "or" before each one of them in the disjunctive.

The Court: Are you asking for it to be admitted under subdivision 5 of subdivision (3) of Rule 26?

Mr. Hughes: Yes, your Honor. Subdivision 5——

The Court: Rule 26(d)(3) 5, is that it?

Mr. Hughes: Yes, sir. And also 2, not in parentheses.

The Court: Where is the witness?

Mr. Hughes: Visalia, California.

The Court: How far is Visalia?

Mr. Hughes: 187 miles.

Mr. Murphey: I will stipulate that the witness resides at Visalia and that it is more than a hundred miles from the courtroom.

The Court: Very well. Is there any further objection to the receipt of the deposition?

Mr. Murphey: Other than it's incompetent, irrelevant and immaterial to any issue in this case, the fact that he may have had this operation.

The Court: Overruled. The deposition will be received in evidence. It's Exhibit No. 15 in the Meyers case, I believe, Mr. Clerk, and Exhibit 13 in the Lyons case.

The Clerk: That is correct, your Honor. [280]

(The exhibit referred to, marked Plaintiff's Exhibit 13 in Case No. 20301 and Exhibit No. 15 in Case No. 20302, was received in evidence.)

* * * * *

FAY LYONS

called as a witness by the plaintiff, having been previously sworn, resumed the stand and testified in rebuttal as follows:

Mr. Murphey: The defendant would offer that in evidence, if the court please. Information which Mrs. [298] Gilliland had at the time she filed her cross complaint.

The Court: Offered for that limited purpose?

Mr. Murphey: That is correct.

The Court: Any objection?

Mr. Hughes: For the fact that she had that, your Honor, at the time she filed her complaint,

(Testimony of Fay Lyons.)

I object that it is immaterial on that basis; that it shows nothing other than Ray Gilliland was in the Colonial House Hotel in Las Vegas, Nevada, and three people were registered there as "Ray Gilliland and family." There is nothing to tie it into this case.

The Court: You are referring to weight rather than its admissibility.

Exhibit E for identification is received in evidence.

(The exhibit referred to, marked Defendant's Exhibit E, was received in evidence.)

The Court: Does the defendant now rest?

Mr. Murphey: Yes, your Honor.

The Court: Very well. This is rebuttal.

Direct Examination

Q. (By Mr. Hughes): Have you ever been in Las Vegas, Nevada?

A. I have never been in Las Vegas, Nevada in my life.

Q. Miss Lyons, you testified that when you went home [299] to Miami in May of 1955 you went home because you had a sick father.

A. Yes. May I explain now?

Q. Yes, ma'am.

Mr. Anson: I am going to object to that as not going to rebut anything we have offered.

The Court: What is the purpose of the question? How can it serve to rebut anything the defense has offered? The defense hasn't questioned that, has it?

(Testimony of Fay Lyons.)

Mr. Hughes: I can't think of any way it does, your Honor.

The Court: Sustained.

I understand the defendant's theory is not that her father wasn't ill, but how she went back and whom she went with. The defense takes issue on that.

Q. (By Mr. Hughes): Why did you go in the manner you did, Miss Lyons?

Mr. Anson: That has been asked and answered.

The Witness: I didn't say——

The Court: About the airline reservations.

The Witness: My father died June 13th. I haven't said that yet. This doesn't have continuity unless I explain the reason and truth of the matter of the strike. It follows up, you see. I got back June 4th——

Mr. Hughes: If you please. [300]

The Witness: And he died June 13th. And then I couldn't——

Mr. Hughes: That is all.

Mr. Murphy: No questions.

The Court: Anything further?

Mr. Hughes: No, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Any further rebuttal?

Mr. Hughes: None, your Honor.

The Court: You both rest?

Mr. Murphey: We rest, your Honor.

Mr. Hughes: Yes, your Honor. [301]

* * * * *

Mr. Hughes: The unsuccessful plea of truth is also an element of damage. If the court finds that they have plead truth as a defense to these causes of action, and they are unsuccessful [353] in their proof in regard to truth, the fact that they plead it is an element of damage.

The Court: That is only involved in the first cause of action, isn't it?

Mr. Hughes: Yes, your Honor.

Also, an element of damage is the loss of future reputation. There has been placed before the court the fact that both of these women have children; one of them with an eight or nine year child, and another one with three children, and both of them wish to look in the eyes of those children as respectable and decent people and not be besmirched or stained by somebody else's private fight.

Another element of this damage is emotional distress and bodily harm. And I am certain the court recalls the testimony of the emotional distress of Mrs. Meyer and the emotional distress of Mrs. Lyons.

The Court: What do you say to any consideration, if we reach that question, being given to the fact as to the second cause of action that plaintiffs may have brought some of the damage on themselves?

Mr. Hughes: In the second cause of action?

The Court: Yes. By giving the appearance that certain things were so, even though they were not?

Mr. Hughes: Well, your Honor, on that basis I call your attention to when a publication is not

privileged, [354] if the publisher had no probable cause for believing the truth of his statement or did not investigate the truth of the statement, he is liable.

The Court: Well, if a wife saw her husband traveling around with another woman, staying all night in hotels with him; if she made a technical error should she be penalized the same as if she made a substantial error?

In other words, what I am getting at is this: Assuming the same damage to reputation, would you seek this same award in a situation where the woman wasn't even at the hotel. And another case where the woman says, "Yes, I was in the adjoining room with him, but nothing happened. Why? Because nothing could happen."

Would you award the same damages?

Mr. Hughes: The same amount?

The Court: Yes. They are both equally damaged in their reputation.

Mr. Hughes: I don't think I would, your Honor.

The Court: Well, that is what I am getting at. How much consideration should be given to the fact where a woman knowingly runs around with a married man who is having divorce troubles with his wife, how much of that damage should be said to be brought upon herself.

Mr. Hughes: I am afraid quite a bit, your Honor. [355]

The Court: It's a little bit like contributory negligence, isn't it?

Mr. Hughes: Well, is contributory negligence a defense?

The Court: No. I didn't mean the precise analogy. I meant like a person hurting himself. A woman who knows that a man is married, knows that litigation is going on between them, shouldn't it be said that she brought some of the damage on herself?

Mr. Hughes: I would say the measure of damage, the value of same, would be greatly reduced.

* * * * *

[Endorsed]: Filed February 26, 1959.

[Endorsed]: No. 16385. United States Court of Appeals for the Ninth Circuit. Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, Appellant, vs. Faye Lyons, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed and Docketed: February 28, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 16385

ELSINORE C. MACHRIS GILLILAND, also
known as ELSINORE MACHRIS GILLI-
LAND, Appellant,

vs.

FAYE LYONS, Respondent.

DESIGNATION OF POINTS ON APPEAL

Appellant hereby designates the following points
to be urged on appeal:

1. The District Court had no jurisdiction under Rule 59(d) of the Rules of Civil Procedure to grant the motion for new trial on the ground stated, namely: that evidence of truth of libelous matter was received, when truth was not pleaded as an affirmative defense.

2. Assuming that the District Court had jurisdiction, the granting of the motion on the ground stated was a gross and prejudicial abuse of discretion.

A. The plaintiff presented evidence on the issue of truth.

B. On cross examination of plaintiff's witnesses, defendant presented evidence on truth without objection by plaintiff.

C. The evidence was admissible on the first and

third causes of action, where truth was pleaded as an affirmative defense.

D. The receipt and consideration of the evidence was harmless as the District Court was not required as a matter of law to find, and did not find, on the issue of truth.

3. If the District Court granted the motion on the ground of insufficiency of evidence to support the finding of privilege (Finding VII), the decision was a gross abuse of discretion as there was ample evidence to support the said finding as a matter of law.

Dated: Feb. 27, 1959.

Respectfully submitted,

WM. L. MURPHEY and
JOHN B. ANSON,

/s/ By WM. L. MURPHEY,
Of Counsel for Appellant.

[Endorsed]: Filed February 28, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD TO BE PRINTED

Appellant hereby designates the following portion of the record, which appellant considers material to consideration of the appeal, and requests that the same be printed, to wit:

A. Complaint—filed 8-9-56

Amended Complaint—filed 11-20-56

Notice of Motion to Strike from Amended Complaint, with Memorandum of Points and Authorities in support thereof

Minute Order dated 12-10-56

Answer to Amended Complaint—filed 12-28-56

Pre-Trial Conference Order [Plaintiff's Exhibit 2]

Findings of Fact, Conclusions of Law and Judgment

Motion for New Trial

Defendant's Memorandum in Opposition to Plaintiff's Motion for New Trial

Plaintiff's Reply Memorandum

Order on Plaintiff's Motion for New Trial

Notice of Appeal

Designation by Appellant of Record on Appeal.

B. Plaintiff's Exhibits 1 to 13, inclusive

Defendant's Exhibits A to E, inclusive.

C. The following portions of the reporter's official transcript of proceedings on June 3, 4 and 5, 1958, to wit:

Page 4, line 12 through Page 5, line 15, inc.

Page 7, line 5 through Page 46, line 5, inc.

Page 46, line 15 through Page 69, line 24, inc.

Page 72, line 5 through Page 83, line 20, inc.

Page 119, line 10 through Page 125, line 12, inc.

Page 125, line 17 through Page 128, line 17, inc.

Page 133, line 1 through Page 149, line 20, inc.

Page 150, line 13 through Page 157, line 15, inc.

Page 158, line 3 through Page 198, line 19, inc.

Page 198, line 21 through Page 199, line 8, inc.

Page 229, line 4 through Page 248, line 24, inc.

Page 249, line 1 through Page 250, line 9, inc.
Page 250, line 10 through line 25, inc.
Page 253, line 14 through Page 254, line 22, inc.
Page 256, line 5 through Page 268, line 16, inc.
Page 270, line 8 through line 25, inc.
Page 271, line 1 through Page 273, line 19, inc.
Page 277, line 11 through Page 281, line 3, inc.
Page 298, line 21 through Page 301, line 14, inc.
Page 353, line 23 through Page 356, line 11, inc.

Dated: March 4, 1959.

Respectfully submitted,

WM. L. MURPHEY and
JOHN B. ANSON,
/s/ By WM. L. MURPHEY,
Of Counsel for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 6, 1959. Paul P.
O'Brien, Clerk.

No. 16385

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELSINORE C. MACHRIS GILLILAND, also known as
ELSINORE MACHRIS GILLILAND,

Appellant,

vs.

RAYE LYONS,

Appellee.

APPELLANT'S OPENING BRIEF.

WM. L. MURPHY and

HOWARD B. ANSON,

By WM. L. MURPHY,

458 South Spring Street,

Los Angeles 13, California,

Counsel for Appellant.

FILED

SEP 10 1959

PAUL P. O'BRIEN, CLERK

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No. 16385

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELSINORE C. MACHRIS GILLILAND, also known as
ELSINORE MACHRIS GILLILAND,

Appellant,

vs.

FAYE LYONS,

Appellee.

APPELLANT'S OPENING BRIEF.

A. Statement Concerning Pleadings, Facts and Jurisdiction.

1. The District Court Had Jurisdiction of the Case.

In each of the three causes of action of the amended complaint filed in the United States District Court for the Southern District, Central Division, the plaintiff alleged she was, at the time of filing said complaint, a citizen of the State of Florida, County of Dade, and that the defendant was a citizen of the State of California, County of Riverside; that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00. [Par. I, Tr. p. 9.]

In each of the causes of action, plaintiff alleged that he suffered compensatory damages in the sum of \$500,000.00 and exemplary and punitive damages in the

sum of \$500,000.00, as a result of certain slanderous and libelous statements alleged to have been published by defendant concerning the plaintiff.

See Paragraphs IV and V of the first cause of action [Tr. pp. 11-12] and Paragraphs IV and V of the third cause of action. [Tr. pp. 15-16] By her prayer, plaintiff sought judgment accordingly. [Tr. p. 16.]

By the pre-trial conference order, after approval by counsel for both plaintiff and defendant, the trial court determined as follows:

“The following facts are admitted and require no proof: A. Plaintiff was, at the time of filing the amended complaint herein, a citizen of the State of Florida and the defendant was a citizen of the State of California, and the matter in controversy exceeded the sum of \$3,000.00, exclusive of interests and costs.” [Tr. p. 40.]

Where there is a diversity of citizenship and the damages involved more than \$3,000.00, the District Court had jurisdiction of the case.

28 U. S. C. A. 1332.

2. This Court Has Jurisdiction of This Appeal.

An appeal will lie to the United States Court of Appeals for the Ninth Circuit from an order made in said United States District Court, granting a motion for a new trial, where such an order exceeds the jurisdiction of the court in that it was made after 10 days from entry of judgment on a ground not specified in the motion for new trial.

28 U. S. C. A. 1291;

Jackson v. Wilson Trucking Corp., 243 F. 2d 212.

B. Statement of the Case.

This is an appeal from an order filed September 30, 1958, granting plaintiff's motion for a new trial filed on June 24, 1958, as to the second cause of action of the amended complaint.

I.

Summary of the Pleadings.

As to the First Cause of Action:

In this first cause of action, plaintiff alleged that the defendant on various occasions made and published false and malicious and slanderous statements concerning her, in substance and effect that: "Ray is shacking up with Faye Lyons" or "Ray shacked up with Faye Lyons" [See Tr. pp. 9-10.] In her answer, the defendant denied each and all of said allegations and alleged as an affirmative defense that each and all of said statements were true. [See Tr. pp. 21-22, Par. II; p. 22, Par. V.]

As to the Second Cause of Action:

In this second cause of action, plaintiff alleged: that the defendant, on November 26, 1955, verified and published of and concerning plaintiff the false and malicious words, to-wit: "That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilliland and said Faye Lyons were registered by him as 'Ray Gilliland and Family'." [See Tr. pp. 12-13, Par. II.]

The defendant in her answer admitted and alleged: that said statements were made in the allegations of her verified cross-complaint for divorce, filed in a divorce proceeding pending in the Superior Court of Riverside County, being action No. 62839 on the register of actions, entitled "George Chester Ray Gilliland, Plaintiff, vs. Elsinore Machris Gilliland, Defendant"; denied that said statements were false and malicious; and, as an affirmative defense, alleged that said statements were privileged under the provisions of §47, Subdiv. 2(3) of the Civil Code of the State of California, in the following facts alleged: (1) that the cross-complaint for divorce was verified by defendant; (2) that said allegations were made by defendant in good faith and without malice; (3) that, at the time said allegations were made, defendant had good and sufficient reason to believe that said allegations were true and had reasonable and probable cause for believing the truth of said allegations; and (4) that said allegations were material and relevant to the issues in said divorce action. *The defendant did not allege as an affirmative defense the truth of said allegations.* [See Tr. pp. 23-25, Par. II; pp. 26-27, Par. VI.]

By the pre-trial conference order, approved by counsel for both plaintiff and defendant, the trial court determined that the following facts were admitted and required no proof: (1) that the alleged libelous statements were made in the verified cross-complaint filed by defendant in said action No. 62839, in the Superior Court of Riverside County, California; and (2) that said di-

divorce action was pending between Ray Gilliland, as plaintiff, and Elsinore Machris Gilliland, as defendant, and that by her cross-complaint said defendant sought a divorce against plaintiff on the grounds of extreme mental cruelty and adultery, and that the allegations of said cross-complaint were material to the issues in said action. [Tr. pp. 40-41.]

As to the Third Cause of Action:

By the third cause of action, the plaintiff alleged that the defendant caused a newspaper article to be published in a newspaper of general circulation in Riverside, California, on March 23, 1956, reading as follows:

"In her counter-complaint for divorce, Mrs. Gilliland accuses her husband of having affairs with two socially prominent women at Lake Tahoe and other affairs in May, June and July of 1955 with two other women at his residence at 4717 N. 71st Pl., Scottsdale, Arizona, a suburb of Phoenix.

"Named as co-respondents in the counter complaint were 'Ann (Peggy) Meyers' and 'Faye Lyons'." [Tr. pp. 14-15.]

C. The Findings of Facts, Conclusions of Law and Judgment.

After trial by the court, sitting without a jury, the Honorable William Mathes, Judge Presiding, signed and filed findings of fact as to the second cause of action, in substance, as follows:

It was true: (a) that the defendant, by her verified cross-complaint filed in said action No. 62839, in the

Superior Court of Riverside County, California, made the said allegations of and concerning the plaintiff. [See Tr. pp. 49-50 Par. V]; (b) that the said allegations of said cross-complaint were verified by defendant and were material and relevant to the issues in said action [Tr. p. 50, Par. VI]; (c) that said allegations were made in good faith and without malice; that at the time said allegations were made, defendant did have good and sufficient reason to believe, and honestly and reasonably believed, that said allegations were true, and that the defendant, at said time, had reasonable and probable cause for believing the truth of said allegations. [Finding VII, Tr. pp. 50-51.]

It is not true: That the plaintiff was damaged by said publication [Finding VIII, Tr. p. 51.]

The court found that the issue of truth was not pleaded as a specific defense and was not set forth in the pre-trial conference order as an issue, and declined to make a finding on "truth" of the said allegations of said cross-complaint in the divorce action, No. 62839 [Tr. p. 51.]

Conclusions of law and judgment were signed on June 16, 1958 and filed on June 17, 1958, in favor of the defendant and against the plaintiff. [Tr. pp. 52-53.]

D. The Motion for New Trial.

A motion for a new trial was filed by plaintiff on June 24, 1958. Said motion did not specify, as a ground, that the trial court erroneously received evidence of the conduct of plaintiff with Ray Gilliland, on the issue of

truth as a justification or in mitigation of damages when truth was not specifically pleaded by the defendant as a defense. The sole grounds specified in said motion for a new trial as to the second cause of action were:

(I) irregularity in the pre-trial proceedings by the elimination of the issue of "truth" as to the slanders and libels from the case, when "falsity" had been pleaded by plaintiff and denied by the defendant;

(II) insufficiency of the evidence to support the following findings of fact, in substance:

(D) Finding VII: (Said allegations of said cross-complaint in said action No. 62839 were made in good faith and without malice, and with probable cause for believing said allegations to be true [Tr. p. 55];

(E) Finding VIII: That plaintiff was not damaged by said publication of said cross-complaint in said action No. 62839 in the sums alleged or in any other sum [Tr. p. 55]; and

(F) Finding IX: That the trial court refused to find on the issue of truth. [Tr. p. 55.]

On August 6, 1958, plaintiff filed a reply memorandum [on motion for new trial], in which it is stated:

"Evidence for the purpose of proving truth is not even admissible in evidence. *Davis v. Hearst*, 160 Cal. 143, at 194, lines 11 to 16." [Tr. p. 73.]

E. The Decision on Motion for New Trial.

On September 29, 1958, the trial court granted plaintiff's motion for a new trial as to her second cause of action on the ground that the trial court erroneously received and considered evidence of misconduct of plaintiff with Ray Gilliland on the issue of truth, when truth as justification, or in mitigation, was not specifically pleaded by defendant as a defense to the second cause of action. This order was filed September 30, 1958.

The order granting said motion for new trial as to the second cause of action, reads as follows:

"IT IS ORDERED that plaintiff's motion for a new trial is hereby granted as to plaintiff's second claim or cause of action only . . . [See: Cal. Civ. Code, §47-2(3); *Davis v. Hearst*, 160 Cal. 143, 195, 116 Pac. 530, 552, (1911); *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 26, 89 Pac. 1097, 1107 (1907).]"

A photo copy of page 195 of *Davis v. Hearst*, reported at 60 Cal. 143, is as attached.

A photo copy of page 26 of *Tingley v. Times-Mirror Co.*, reported at 151 Cal. 1, is as attached.

Each of these reported cases holds at the page cited that, in a libel action, evidence as to truth as justification or in mitigation, is not admissible unless truth, as justification or in mitigation, is specifically pleaded as a defense. This is the *exclusive* subject-matter of the pages cited.

As it was neither alleged directly nor in effect that the charge relative to plaintiff's treatment of Mrs. Neirsheimer was true, the plea was insufficient as a justification, and must be treated, as the answer declared it was interposed, as a plea in mitigation.

But as a plea in mitigation it is radically insufficient. In order to have constituted a good plea in mitigation it was necessary for the plaintiff to have alleged and proven that it had knowledge of the facts set up in mitigation prior to the publication of the article from reliable sources, or had ascertained them after due investigation and believed them to be true. (*Wilson v. Fitch*, 41 Cal. 363; *Barkly v. Copeland*, 74 Cal. 3, [5 Am. St. Rep. 413, 15 Pac. 307]; *Edwards v. San Jose P. and P. Society*, 99 Cal. 437, [37 Am. St. Rep. 70, 34 Pac. 128].)

Now, the only allegation in this plea is that which we have quoted above,—namely, that Mrs. Neirsheimer and others had communicated the facts alleged in the subdivision of the answer in question to various persons in the city of San Diego, and that they were matters of public notoriety in that city. This did not constitute a good plea in mitigation. It is simply an allegation that there were rumors of the matters set up in the plea. But an allegation of rumors, or proof of them, would not constitute or support a plea in mitigation. (*Wilson v. Fitch*, 41 Cal. 363; *Edwards v. San Jose P. and P. Society*, 99 Cal. 437, [37 Am. St. Rep. 70, 34 Pac. 128].) It is not alleged that defendant had any knowledge on any rumored matters, or that it ever investigated them, or if so that it believed them to be true and in good faith made the publication of them. In fact, it is not even alleged by the defendant that at the time of the publication it had ever heard of the rumors. Under the authorities, in the absence of such allegations, no sufficient plea in mitigation is stated. As there was no plea in justification, and no sufficient plea in mitigation, the court properly excluded the evidence bearing on the facts set up in this subdivision of the answer.

9. No error was committed in the rulings of the court as to evidence of the general reputation of plaintiff. This was offered to be proven by the depositions of three witnesses taken on behalf of defendant—two in New York and one in Boston. The testimony of the New York witnesses was prop-

Pac. 1097].) Evidence was rejected which was offered to show that in other respects than in those specified in the articles, the recommendation of the plumbing inspector and health officer had been disregarded by the board of education. This evidence was offered in mitigation as tending to prove the truth of the charge of loose methods, etc. Therefore, it could and should have been pleaded in mitigation with an allegation of the knowledge of the defendants of the fact at the time of the publication. For there is this broad distinction between a plea in justification and evidence of the truth given in mitigation: the truth whenever discovered is a complete defense to the defendant. But to repel the conception of malice in the publication, only so much of the truth as the defendant knew at the time of the publication can avail him. The same ruling of the court was proper in reference to evidence directed to specific acts of favoritism which had not been pleaded in justification. The offered evidence to show that the manner of filing demands from the school board and the delivery of the warrants in favor of the claimants had been changed since the publication, could not, of course, be evidence tending to repel the existence of malice at the time of the publication. And if the charge against plaintiff in this regard was libelous, the evidence could only be considered as tending to show the truth of the charge and was properly rejected as not having been pleaded in mitigation. Evidence to substantiate the charge that plaintiff as a member of the school board, gave out false information, could have been shown under a plea in mitigation specifically naming the persons to whom such false information was given. (Odgers on Libel & Slander, p. 591.) But in the absence of such a plea in mitigation, the evidence was properly excluded.

There was given to the jury, as an instruction, an argumentative discussion by this court in *Dauphiny v. Buhne*, 153 Cal. 757, [126 Am. St. Rep. 136, 96 Pac. 880], where there was under consideration the question of qualified privilege as a defense to libel—a question not in this case at all. In the *Dauphiny* case it is pointed out that “it is always injudicious to take the language of a court, in discussing a proposition of law, as correct instruction to be given to a jury.” This is necessarily so, for it is always proper and frequently imperative upon a court of review, in answering arguments *pro* and

I.

The District Court Had No Jurisdiction Under Rule 59(d) of the Rules of Civil Procedure to Grant the Motion for New Trial on the Ground States, Namely: That Evidence of Truth of Libelous Matter Was Received, When Truth Was Not Pleaded as an Affirmative Defense.

Rule 59 of the Federal Rules of Civil Procedure sets forth the procedure authorizing the granting of new trials. In general, upon the timely filing of a motion for new trial in an action tried without a jury, the Court may grant a new trial for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States.

28 U. S. C. A., Rule 59, Fed. Rules of Civil Procedure.

It is further provided that, not later than ten days after entry of judgment, the Court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the ground therefor.

28 U. S. C. A., Rule 59(d), Fed. Rules of Civil Procedure.

It has been repeatedly held that, upon the lapse of ten days after entry of judgment, the Court is without power to grant a new trial upon any ground not stated in the timely-filed motion therefor, and that any order granting a new trial upon a nonspecified ground, made after said ten-day period, is void and beyond the jurisdiction of the court.

Jackson v. Wilson Trucking Corp., 243 F. 2d 212 (1957, Dist. of Col.);

National Farmers Union Auto & Cas. Co. v. Wood, 207 F. 2d 659 (1953, 10th Cir.); *Freid v. McGrath*, 133 F. 2d 350 (1942, Dist. of Col.), cf. *Citizens Nat. Bank of Lubbock v. Speer*, 220 F. 2d 889 (1955).

In the case at bar, the judgment was entered on June 17, 1958 and plaintiff's motion for a new trial was filed on June 24, 1958. However, the court's order granting a new trial only as to the second cause of action was not made until September 28, 1958. Hence, the time within which the court had the power to act under its own initiative had long since expired and the court, in granting a new trial, was limited to the grounds stated in plaintiff's motion.

The order granting a new trial specified:

“[See: Cal. Civ. Code, §47-2(3); *Davis v. Hearst*, 160 Cal. 143, 195, 116 Pac. 530, 552 (1911); *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 26, 89 Pac. 1097, 1107 (1907).]”

By reference to the statute and reported cases, the court clearly indicated its grounds for the order.

The citation of Civil Code §47-2(3) is of course, the statutory counterpart to the common law plea of mitigation referred to in *Davis v. Hearst*, *supra*, and *Tingley v. Times-Mirror Co.*, *supra*, at the pages cited by the court. In the case *Davis v. Hearst*, *supra*, the court, at the page cited, was concerned solely with the exclusion of evidence tending to show the truth of libelous matter, where truth as justification or in mitigation of damages was not pleaded by the defendant. This was also the sole matter under discussion in *Tingley v. Times-Mirror Co.*,

supra, at the page cited by the court. Both cited cases held, on this point, that the evidence offered was properly excluded by the trial court since neither a plea of truth as justification, nor in mitigation of damages, was before the court there. From an examination of the order granting a new trial and the specific citation in said order, it is certain that the trial court's ruling here was based solely upon the ground that evidence had been improperly received, which evidence tended to prove the truth of the alleged libel, when the defense of truth had not been pleaded as to the second cause of action. At this point, it is not necessary to inquire as to whether such evidence was, in fact, erroneously received by the trial court. This ground for granting a new trial would be available only if it were a ground specified in plaintiff's motion for new trial.

Plaintiff's motion for new trial specified, with relation to the second cause of action, only two grounds in support thereof. [A third ground (failure to offer a deposition) was designated, which required affidavits in support thereof. No affidavits were filed and hence, this ground may be disregarded.] The two grounds were as follows:

"I. Irregularity in the Pre-Trial Proceedings by the elimination of the issue of 'truth' as to the slanders and libels from the case when 'falsity' had been pleaded by plaintiff and denied by the defendant;

* * * * *

"III. Insufficiency of the evidence to justify the decision. The following specifications are urged:

* * * * *

D. Finding VII is opposed to the weight of substantial and probative evidence in that there is no evidence save the self-serving and self-contradicted statements of defendant herself to support the finding that she acted 'in good faith' and 'without malice' and that she honestly and reasonably believed that the allegations were true at the time they were made. The last three lines of said Finding are a conclusion of law.

E. Finding VIII is opposed to and is not supported by a fair preponderance of substantial and probative evidence.

F. Finding IX is erroneous as constituting a spurious excuse for omitting a necessary finding essential in the establishment of substantial justice in this case."

Nowhere in said motion is there any reference to error in the receipt of evidence at the trial of this action. In fact, the *only* reference to such matter—until the order granting the new trial was made—is found in an obscure reference in plaintiff's reply memorandum [filed August 6, 1958], wherein she states:

"Evidence for the purpose of proving truth is not even admissible in evidence. *Davis v. Hearst*, 160 Cal. 143, at 194."

Appellant submits that the court granted said motion for new trial on a ground not stated in plaintiff's motion; that, since the ten-day period within which the court could act on its own initiative had expired, the court was without power to grant a new trial on the ground stated in its order. Therefore, the order should be reversed and the judgment for defendant reinstated.

II.

Assuming—Without Conceding—That the District Court Had Jurisdiction to Grant a New Trial on the Ground Stated—a Ground Not Mentioned in the Motion for New Trial—the Granting of the Motion on the Ground Stated Was a Gross and Prejudicial Abuse of Discretion.

Although we freely concede that the trial court possesses a wide discretion in granting or denying a motion for a new trial, we believe that to grant a new trial on the stated ground of erroneous receipt of evidence introduced by plaintiff, herself, would be a plain and direct abuse of discretion reviewable on appeal.

It has been held that, although the trial court possesses a discretion in granting or denying a motion for a new trial, such discretion must be exercised wisely and, *if it clearly appears that such discretion has been exercised unwisely and has been plainly abused, it is reviewable on appeal.*

United States v. 2969.59 Acres of Land, 56 Fed. Supp. 831 (D. C. Idaho, 1944).

It is too well established to require detailed citation that a new trial should not be granted except for that which did prejudice to the moving party.

Union Elec. Light & Power Co. v. Snyder Estate Co., 15 Fed. Supp. 370 (D. C. Mo., 1936).

The ground stated for the granting of the new trial here, that evidence of truth of the alleged libelous matter was received when truth was not pleaded as an affirmative defense to the second cause of action, could not possibly prejudice the plaintiff for the following reasons:

A. THE PLAINTIFF, HERSELF, TENDERED AND PRESENTED EVIDENCE ON THE ISSUE OF TRUTH.

1. Plaintiff elicited evidence from the defendant, the only probative value of which related to the truth of the alleged libel. Plaintiff's first witness, called as an adverse witness, was defendant Elsinore C. Machris Gilliland [Tr. p. 85], whose testimony upon this direct examination is found on pages 85-118 of the transcript. Toward the close of her direct testimony, the following occurred:

“Q. (By Mr. Hughes): Mrs. Gilliland, did you ever have an act of sexual intercourse with Ray C. Gilliland?

Mr. Murphey: Just a minute. I object to that as being incompetent, irrelevant and immaterial.

Mr. Hughes: I will reframe the question, your Honor.

Q. Isn't it true, Mrs. Gilliland, you were married May 3, 1954, and that you had an interlocutory decree of divorce granted you June 13, 1956, and in the intervening time you never had an act of sexual intercourse with Ray C. Gilliland?

Mr. Murphy: I object to that as being incompetent, irrelevant and immaterial, outside of any issue in this case.

The Court: Of course, if there had been evidence here it might be very good on rebuttal, if there was evidence claiming this was true. But all that is before the court now is the allegation of the cross-complaint. Is that correct?

Mr. Hughes: Yes, your Honor.

The Court: As far as any claim of libel is concerned. Now, if you rested on that and the defense

offered to prove that it was true, then in rebuttal it might be competent for you to show that he was incapable of it. And that is the purpose of the question, isn't it?

Mr. Hughes: Yes, sir.

The Court: I will sustain the objection at this time." [Tr. pp. 117-118.]

Prior to resting his case on direct, plaintiff's attorney again pursued the same questions, and the following occurred:

"Q. Did you ever have sexual intercourse with Ray C. Gilliland during the period of May 3, 1954 through June 13, 1956?

Mr. Murphey: Just a moment. That is objected to as being incompetent, irrelevant and immaterial; no proper foundation laid.

Mr. Hughes: If your Honor please—

The Court: There again it is probably more proper on rebuttal, a matter of order of proof, and the objection will be overruled.

Q. (By Mr. Hughes): Would you answer, please, Mrs. Gilliland? A. No.

Mr. Hughes: I have no further questions, your Honor.

The Court: Any questions?

Mr. Murphey: No questions of this witness at this time.

The Court: You may step down, Mrs. Gilliland.

(Witness excused.)" [Tr. p. 176.]

As stated by the trial court, the only materiality of this evidence related to the truth of the alleged libel.

2. Plaintiff's counsel took the position in open court that truth of the libelous statements was in issue. Prior to plaintiff's direct examination, the following occurred:

"Mr. Hughes: If your Honor please, the plaintiff here, subject to orderly process, can testify as to when she first heard of these things, what she did, if anything, about them, and her relationship, if any, with Ray C. Gilliland; that the gravamen of this action is the truth of these statements—

The Court: Is this offered on the second cause of action?

Mr. Hughes: This is offered, your Honor, not only on the first cause of action *but also on the second cause of action.*" [Tr. pp. 119-120.]

Thus, plaintiff's counsel put in issue the truth of the statements set forth in the second cause of action.

3. Plaintiff elicited evidence relating to truth of the alleged libel from the plaintiff Faye Lyons, his second witness. Plaintiff in great detail testified regarding her relationship with Mr. Gilliland, including the following aspects thereof:

(a) Her visit to his ranch in Oregon in 1937 and return to Reno. [Tr. p. 120.]

(b) Her meeting with him in Miami, Florida, in 1954 and 1955. [Tr. p. 121.]

(c) Her trip to Scottsdale, Arizona, in the Spring of 1955; and, in detail, regarding her visits with Mr. Gilliland and her relationship with him during her week's visit to Scottsdale. [Tr. pp. 121-123.]

(d) Her automobile trip with Mr. Gilliland between May 2 and May 9 or 10, 1955, from Scottsdale to Miami, including their visits at Knox City,

Texas, and Fort Worth, Texas, en route, including separate accommodations at Fort Worth, and from Fort Worth to Miami. [Tr. pp. 123-126.]

(e) Her second trip to Scottsdale about June 3, 1955, her accommodations at Paradise Valley Guest Ranch, Scottsdale, who occupied the bedrooms, the purpose of this second trip, her visits with Ray Gilliland, her side trip to Los Angeles, California, her denial that she stayed overnight in Mr. Gilliland's home in Scottsdale, the presence of Mrs. Lampert (Mr. Gilliland's housekeeper), their household routine, the bringing of her friend, Beatrice Nemer Schor, to Scottsdale from Los Angeles. [Tr. pp. 126-132.]

And finally, after testifying regarding damages [Tr. pp. 132-138] plaintiff closed her direct examination as follows:

"Q. And during that period, August 29, 1955 through October 23, 1955, you were always in Miami, Florida? A. Yes.

Q. Did you ever have sexual intercourse with Ray Gilliland? A. No.

Mr. Hughes: I have no further questions.

The Court: That concludes your examination?

Mr. Hughes: Yes, your Honor." [Tr. p. 138.]

4. Plaintiff's attorney also elicited from his third witness, Blanche Lampert, testimony relative to the truth of the alleged libel. Her testimony is found on pages 139-148 of the transcript. She was questioned at length about the number of visitors at the Ray Gilliland house, where Mr. Gilliland slept. [Tr. pp. 139-142.] Then the follow-

ing questioning by plaintiff's attorney, Mr. Hughes, took place:

“Q. Did you see anything in the house that would lead you to believe that Faye Lyons committed adultery with Ray Gilliland?

Mr. Murphey: I object to that as calling for a conclusion of the witness and being incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Hughes): Well, what did you observe between the conduct of Ray Gilliland and Faye Lyons, if anything? A. Well, she was down there, and they partied together. I mean they had drinks together. And they argued a little bit.

Q. In fact, all four of you, your husband and yourself and Ray and Faye Lyons sat in the kitchen and ate dinner, and such, didn't you? A. We have, yes.” [Tr. p. 142.]

The foregoing testimony was in addition to that testimony elicited from the witness Blanche Lampert with regard to the information concerning this relationship which she related to the defendant and defendant's attorney, Mr. Murphey, in a sworn statement, Plaintiff's Exhibit 5 herein. [Tr. pp. 147-148.] A summary of Exhibit 5, concerning the conduct of Faye Lyons is as follows:

“In May, 1955, Ray was keeping Faye Lyons up at Paradise Valley Guest Ranch. I cooked a steak dinner for them there. One night he got mad at some friends, Blake and Kent, and Ray Gilliland went up there and stayed all night at Paradise Valley Ranch when Faye Lyons was there. Faye Lyons used to come down and stay until two or three o'clock

in the morning at Ray Gilliland's house. They would sit there and drink together. Later Mr. Gilliland and Faye Lyons went on a trip and came back. When they came back they brought Faye's boy with them. They got in a fight and Ray slapped her and she threw a glass at him—Faye Lyons broke a glass on him. When they came back she took the boy up to Paradise Valley Guest Ranch but she was down there at Ray Gilliland's house every day and I babysat with the boy or one of the neighbors did until two or three o'clock in the morning. She was there from May to June when she left. Ray Gilliland bought an automobile. I saw the title. He bought it on payments. Faye Lyons had it until he got mad at her and took it away from her. She drove it all the time. It was a Dodge; I think he bought it from Ed Spears."

5. Plaintiff's fifth witness [the fourth witness, Frank Kerwin, only testified regarding the first cause of action, not involved here], Beatrice Nemer Schor, testified on direct examination regarding plaintiff's trip to Scottsdale after plaintiff's visit to Los Angeles, also plaintiff's lack of association at Los Angeles and Scottsdale with Ray Gilliland. [Tr. pp. 149-153.] The only possible relevancy of such testimony would be in relation to the truth or falsity of the alleged libelous allegations.

We submit that all the foregoing testimony was specifically offered by plaintiff on the issue of the truth of the alleged libel—it could have no possible relevancy to any other issue.

B. ON CROSS-EXAMINATION OF PLAINTIFF'S WITNESSES,
INCLUDING PLAINTIFF HERSELF, DEFENDANT OF-
FERED EVIDENCE ON THE ISSUE OF TRUTH WITH-
OUT ANY OBJECTION BY PLAINTIFF.

1. None of the evidence relating to the issue of truth of the allegations in the alleged libel brought out by defendant on cross-examination of plaintiff's witnesses was objected to by plaintiff.

It is well established that complaint cannot be made on appeal of the introduction of evidence which was introduced without objection.

Smails v. O'Malley (1942), 127 F. 2d 410, C. C. A. Neb.;

Collins v. Streitz (1938), 92 F. 2d 430 [Certiorari denied, 59 S. Ct. 67, 305 U. S. 608, 83 L. Ed. 387].

Assuming, without conceding, that the evidence of truth was immaterial on the second cause of action, it is well established that the right of cross-examination is not confined to the specific questions asked or detail elicited on direct examination, but extends to the *subject-matter* about which inquiry was made.

Butler v. N. Y. Central Ry. Co. (1958), 253 F. 2d 281, C. A. Ind.

2. The only testimony regarding the truth of the alleged libelous matter which was elicited by defendant was on cross-examination, of plaintiff's witnesses *without objection*, a *summary* of which follows:

Cross-Examination of Plaintiff, Faye Lyons:

I was born November 29, 1913, at New York City. My father's name was Isidore W. Lyons.

My mother's name was Elsa Spielholz. I have one sister, Lois Springer. I have had an elementary and high school education. I moved to Florida in 1951. I had been in show business when I was a child, until I was 17 or 18. [Tr. p. 177.]

In response to a question whether she was a chorus girl in a George M. Cohan production, the witness testified:

"Yes, I was 12 or 13 years old, and I had the privilege of being in a George M. Cohan production in which I understudied and did appear in two or three very lovely production numbers. I was not a chorus girl as I think of the term." I also was in one George White show when I was 16. I posed for James Montgomery Flagg as a child for a cover of *Cosmopolitan* magazine. I have been married twice. The first was to Arthur Cohen in 1932. I was divorced from him at Reno, Nevada, in 1937. I married Emanuel M. Pomerantz in 1944 in New Jersey. I had one son by him, born March 30, 1949. [Tr. p. 178.] I was divorced from Mr. Pomerantz April 9, 1952 at Miami, Florida. [Tr. p. 179.]

I knew Ray Gilliland. I first met him in 1937 at Reno, Nevada. I took a trip with Mr. Gilliland to Oregon with five or six other people. I returned the next day. I don't remember whose car was used on the trip. [Tr. p. 179.]

Some time after I went to New York I saw Mr. Gilliland. He visited at my home several times. I ran into him at a restaurant in New York unexpectedly, at Luchow's. [Tr. p. 179.]

I saw Mr. Gilliland at Miami Beach in 1954. I was working at L'Aiglon. Among other duties, I

had a hat and cigarette concession. I sold cigarettes personally sometimes. My hours at L'Aiglon were approximately 7:30 P.M. to midnight, and at times 2:00 A.M. I worked there until approximately April 1956. [Tr. p. 180.]

After this, I had a cigarette and hat concession at the Felix Young restaurant. I greeted patrons and in exchange I had these concessions. [Tr. pp. 181-182.]

Once in Miami in 1954, after work one night I went out with Mr. Gilliland to the Patio restaurant. I met Ann Meyers there. Mr. Gilliland introduced me to her. It was about 11:00 or 12:00 o'clock. [Tr. p. 183.]

From this party I drove Mr. Gilliland's rented car home after about a half hour. The next day I dropped Mr. Gilliland's car off at Mrs. Meyers' home. This was in January 1954. [Tr. p. 184.]

In 1955, I saw Mr. Gilliland at Miami Beach two, or possibly three or four times. I remember his being at the house for dinner on two occasions and at L'Aiglon on one or two occasions. [Tr. p. 184.]

I knew that Mr. Gilliland married Elsinore Mac-hris on or about May 3, 1954. I saw it in the papers, their big wedding party. I knew that commencing about January 1955 they were having marital difficulties. I knew this when I saw Mr. Gilliland at Miami Beach in 1955, when he was there a few days. [Tr. p. 185.]

The next time I saw Mr. Gilliland was at Scottsdale or Phoenix, Arizona, in April 1955, around the 23rd or 24th of April. I flew out alone. Mr. Gilliland met me at the airport and took me to the

Paradise Valley Guest Ranch. I don't think I registered. Mr. Gilliland drove me from the airport, introduced me, stayed a few minutes, and left. I received a phone call from Mr. Gilliland inviting me to come out there. "I spoke to him on the phone to tell him when I was coming." [Tr. pp. 185-186.] I testified that I went out there for the purpose of possible business locations, either a hotel or motel or restaurant. I planned to stay a little while and then return to Miami and take a course in restaurant and hotel management, or cashiering. [Tr. p. 187.]

The Paradise Valley Guest Ranch is approximately three or four blocks from Mr. Gilliland's house. I don't remember any correspondence with Mr. Gilliland about coming out. I stayed at Paradise Valley Guest Ranch six, seven or eight days. While there I met Blanche Lampert. The day after I met Blanche Lampert, I left. [Tr. p. 187.] It seems I had seen her more than once, possibly twice, before I left on May 2nd. I also met Ray Lampert. He did the yard work at Ray Gilliland's home. Blanche came in late, about 4:30 or 5:00 o'clock, to cook their dinner. The house has a room separated from the main house by a carport and Mr. and Mrs. Lampert occupied this bedroom. [Tr. p. 188.]

I went down to Mr. Gilliland's home in the evening a few times. I may have had an occasional one or two highballs. [Tr. p. 189.]

I don't think I ever was at Mr. Gilliland's home when there were no other people present. The first day I was there with other house guests. Early in the evening I was watching a car up the road, something very odd about this. The car was parked there

for about an hour or more with the little parking lights on and I wondered what it was doing there. We noticed the car start and come very slowly by the house, from three or four hundred feet, and it circled the house and went back to the starting point. Somebody said “. . . it must be detectives” or “someone watching the house.” This happened so many times after that I realized I might be subjecting myself or exposing myself and decided I had better not ever be alone with Mr. Gilliland in view of this. We were aware that we were being followed or shadowed. Judge Blake and Mrs. Blake were there and some other people, whose names I don’t remember. [Tr. pp. 189-190.]

“I had the feeling that I had come into a hornet’s nest or in the midst of something that I would be better off not ever being with Mr. Gilliland. I was wary, concerned.” [Tr. p. 191.]

Four or five days after I arrived I received a telephone call from my mother concerning my father. I drove with Mr. Gilliland from Scottsdale, Arizona, to Knox City, Texas. I don’t remember whether Clyde Williams was with us or not. I may have driven alone with Mr. Gilliland. We left early in the morning, about 6:00 or 7:00 o’clock. I don’t remember whether we drove straight through to Knox City, or stopped overnight. [Tr. pp. 191-192.]

On arrival at Knox City, we first went to Judge Williams’ house and had lunch there. After a couple of hours we drove to Fort Worth, stopping on the way to look at oil property. [Tr. p. 192.] Mr. Clyde Williams was with us. When we got to Fort Worth we stayed at the Hilton Hotel. I did not register.

I don't remember who registered. We had adjoining or consecutive rooms. I don't know whether there were doors between. I would not say there were not. Clyde Williams' room was next to mine. Many of these older hotels have doors between the rooms which can be locked or left open at will, if so desired. There were probably doors between. [Tr. p. 193.]

At a club we met some friends of Clyde's. Clyde introduced Mr. Gilliland and me. According to my recollection, Mr. Gilliland did not introduce me as "Mrs. Gilliland." I wouldn't say that he did not do so. [Tr. p. 194.]

We all stayed at the Hilton Hotel that night. I occupied the bedroom next to Mr. Gilliland's. [Tr. p. 194.]

Mr. Gilliland offered to give me some money to do a little shopping, to get myself a little present. I refused. The next day, Mr. Gilliland and I left in his car for Miami, Florida. I couldn't get an airplane reservation. I had to get home quickly because my father had a stroke. [Tr. pp. 195-196.]

I don't remember the first city we stopped at or the hotel at which I registered or stayed. I have no knowledge of any of the cities we stopped at between Fort Worth and Miami Beach except New Orleans, Tampa, and Montgomery, Alabama. I do not remember the names of any of the hotels where we stayed. At these hotels or motels, Mr. Gilliland and I had adjoining rooms, depending on the available rooms at the time. Sometimes they were next to each other and sometimes they weren't.

"Q. Well, is it of any importance to you whether they were adjoining or not? A. Absolutely none." [Tr. pp. 197-198.]

Sometimes Mr. Gilliland registered, sometimes I did. Mr. Gilliland paid all of the lodging bills. He paid for my meals on this trip. [Tr. p. 198.]

At Miami, Mr. Gilliland stayed at North Beach. He left the next, or the following day. Before he left he phoned me saying, in substance, he was leaving for Scottsdale and would like to see me before he left. He stopped at my home to say goodbye. [Tr. pp. 198-199.]

While Mr. Gilliland was at Miami, my little boy and I went over to his hotel and went swimming for an hour or two, then left. Before leaving, I invited him to dinner. I don't recall seeing him any other time at Miami on this occasion. I stayed at Miami about a week or ten days and then flew to Phoenix with my son. Mr. Gilliland met me at the airport. He took me out to Paradise Valley Guest Ranch. I don't remember registering. I occupied the same apartment, No. 1, the same apartment I occupied when I was there before. [Tr. p. 199.] I stayed about four or five weeks, including the time for my trip to Los Angeles, which was five days. I think I arrived the 3rd or 4th of June and left on July 7th. [Tr. p. 200.]

When I arrived at Scottsdale upon my return from Miami Beach, Ray Gilliland and Clyde Williams drove out to Paradise Valley Guest Ranch. They were driving a brand new Dodge sedan. Mr. Gilliland did not hand me the keys and say, "Here, this is for you." He said, "It's all yours to use while you are here." He also said, "It's very hard to be in this country without a car." He did not say, "This is your car." [Tr. p. 201.]

Mr. Gilliland gave me some money for a dog for my boy. I don't remember the date. I went down to look at the dog but told my boy that it was more practical to wait until we returned to Miami. Mr. Gilliland gave me \$200.00. When he gave it to me he said he won it and to buy something for Dan. I took the money. [Tr. p. 202.]

When I returned from Miami to Scottsdale, I saw Mr. Gilliland on many occasions, several times. I would estimate eight or ten times. He took me to dinner. I don't remember him taking me to lunch. He took me and my son on a trip to Prescott one day, leaving about 10:00 in the morning and returning about 5:00. [Tr. pp. 202-203.]

I never went to Mr. Gilliland's house in the late afternoon and stayed until 2:00 or 3:00 o'clock in the morning. [Tr. p. 203.] I don't remember that I ever had highballs with Mr. Gilliland alone in his home. Mr. Gilliland did not stay at the Paradise Valley Guest Lodge at any time while I was there. I did not have an argument or disagreement with him, at which time he took the automobile away from me and I never threw a glass at him. He never did slap me. I never slapped him. [Tr. p. 204.]

I went to Phoenix with the idea of buying a business. When I left for Scottsdale, I had \$700.00 or thereabouts. I flew out. Mr. Gilliland wired me the money for plane fare from Miami to Scottsdale. He wired the money unbeknownst to me. I accepted it." [Tr. pp. 204-205.]

The deposition of Faye Lyons was offered for identification and marked Defendant's Exhibit B for identification. [Tr. p. 206.]

All of the foregoing testimony, the only relevancy of which related to truth of the alleged libel, was elicited on cross-examination *without any objection on the part of plaintiff*. In fact, the only object in the entire cross-examination was as follows:

“Q. Did you ever have highballs with Mr. Gilliland alone in his home? A. I don’t remember.

“Q. Would you say that you did not have highballs with him in his home alone?

Mr. Hughes: Your Honor, I object to that line of questioning. The question has been asked and answered.

The Court: Sustained.”

Testimony of Clyde Williams:

In addition to the foregoing testimony relative to truth of the allegations of adultery between plaintiff and Ray Gilliland, elicited on cross-examination without objection, plaintiff stipulated in writing that Clyde E. Williams be deemed to have been called and to have testified in accord with Defendant’s Exhibit C. [Tr. p. 210.]

A summary of the testimony of Clyde Williams is as follows:

Faye Lyons and Ray Gilliland arrived at Knox City in May 1955. They spent two or three hours at his home and that of his father, Judge Williams. In the afternoon he, Faye Lyons and Ray Gilliland drove to Fort Worth and registered at the Hilton Hotel. Faye Lyons and Ray Gilliland had adjoining rooms with an interconnecting door, and Clyde Williams had a room several doors down the hall. All three spent the first evening at the Fort Worth Club; that he met some of his friends, introduced Ray

Gilliland who, in turn, introduced Faye Lyons as "Mrs. Gilliland." The next morning Ray Gilliland gave Faye Lyons some money to shop with. That night they had dinner at the Hilton Hotel after which Ray Gilliland and Faye Lyons retired to their rooms. I drove Ray Gilliland's car from Miami Beach to Scottsdale where I spent four or five days. Faye Lyons spent most of her time at Ray Gilliland's house at Scottsdale. She hired a baby-sitter for her son. They did considerable drinking and night-clubbing. They often laughed at what Mrs. Gilliland would do if she knew what was going on. Ray Gilliland bought a new Dodge sedan, drove it with me to Paradise Valley Guest Ranch. Ray Gilliland gave Faye Lyons the keys, saying in substance: "It is all yours."

Cross-Examination of Plaintiff's Witness, Blanche Lampert:

On cross-examination of plaintiff's witness, Blanche Lampert [Tr. pp. 211-222], defendant's attorney elicited information regarding the argument plaintiff had with Ray Gilliland, as follows:

"Q. Now, on the occasion that you have mentioned in your statement about Mr. Gilliland and Faye Lyons getting into an argument—did you hear that argument? A. I remember about that, yes. It was the last night—

Mr. Hughes: I would like to know, your Honor, the date, time, place, and who was present—the foundation.

Mr. Anson: This is cross-examination, your Honor.

The Court: Let's have it so we will know. We can follow the testimony better, anyhow.

The Witness: Mr. Gilliland—

The Court: Just a moment. Let's find out where it was and who was there.

Q. (By Mr. Murphey): Do you remember when it was? A. It was the last day or the next to the last day that Faye was out at Scottsdale before she left. And she didn't go to Vegas. She went home. Mr. Gilliland asked me—they had been having trouble and Faye said she could not have anything more to do with him, that he was drinking too much. So Mr. Gilliland asked me if I would go up and babysit so he and Faye could talk things over.

So I went up and babysat with the little boy. And pretty soon, not too late, because she wasn't gone very long, Faye came home.

Q. Where was this? A. At the Paradise Guest Ranch. And Mr. Gilliland brought her home. And I said to her, 'Where is the Dodge?'

She said, 'He took it away from me. We had a fight.' She said, 'He slapped me and I threw a glass at him.'

I went back down to Mr. Gilliland's home and he told me the same thing. I swept up the glass.

But before I went I said to Faye, 'Are you still going to Vegas?'

'No,' she says, 'I am going back home to Miami.'

Q. All right. Now, on another occasion was there an argument? Did an argument develop while there were guests at the house?

A. Yes. The night that Judge and Mrs. Blake, Phil Kent and his wife and Faye and Mr. Gilliland—

we had a steak dinner there at Mr. Gilliland's home. Mr. Blake and I cooked the dinner, and Mr. Gilliland got pretty—well, he drank quite a bit and got very obnoxious. So Faye said to him, 'Take me home.'

So he took her up to the Paradise Valley Guest Ranch and he didn't come back. And the next morning I took my husband to work when he was a gardener there, and Mr. Gilliland, about a quarter to 8:00, came out of her apartment, and his car was still sitting in front of her apartment. And Lee was there—, that is, Mrs. Silverman—and she really gave Ray the dickens for staying up there." [Tr. pp. 216-218.]

Also, *without any objection*, the following testimony bearing on truth of the alleged libel was elicited on cross-examination of plaintiff's witness, Blanche Lampert:

"Q. Did you ever observe Mr. Gilliland kissing Faye Lyons? A. Once or twice.

Q. When? A. In the kitchen out by the bar when we were all sitting out there.

Q. Where was this? What house? A. At Mr. Gilliland's house.

Q. Was anybody else present? A. My husband and I.

Q. Is that the same on both occasions? A. Yes.

Q. Did Mr. Gilliland ever make any statement to you concerning his sexual inclinations with women?

A. He just said that he—

Q. Yes or no, please. A. Yes.

Q. When was this? A. One time when my husband and him was discussing women and being with women, and things.

Q. And what period, about what month would you say? A. Well, it was—well, it was the same time I was living there, from July—or, during July and August, when I was there.

Q. Where did this conversation take place? A. Mr. Gilliland's home.

Q. And who else was present, if anybody? A. My husband and myself and Mr. Gilliland.

Q. All right. What did Mr. Gilliland say? A. He said he would not have anything to do with any women, play around with them or travel with them unless they come through the way he wanted them to.

Q. Now, did you—
Mr. Hughes: Your Honor, I am going to move that that be stricken unless he establishes a substantial foundation as to who was present, the time, date and place.

The Court: You may cross-examine on it or re-examine on it. The motion is denied." [Tr. pp. 220-221.]

*Testimony of Frank Teich, Manager of the Hilton Hotel,
Fort Worth, Texas:*

The deposition of Mr. Teich [Pltf. Ex. 12] was, in substance:

That during May or June 1955, there was no registration for Ray Gilliland, Faye Lyons or Clyde Williams at the Hilton Hotel.

It may be fairly assumed that they registered under fictitious names.

Testimony of Raymond Silverman, Co-Owner of the Paradise Valley Guest Ranch:

The deposition of Raymond Silverman [Pltf. Ex. 10] was, in substance:

That there was no registration for Ray Gilliland or Fay Lyons at the Paradise Valley Guest Ranch.

Defendant submits that the great preponderance of the evidence supports only one conclusion, namely: that plaintiff and Ray Gilliland did commit adultery.

C. THE EVIDENCE OF TRUTH OF THE ALLEGED MISCONDUCT OF PLAINTIFF AND RAY GILLILAND WAS ADMISSIBLE ON THE FIRST AND THIRD CAUSES OF ACTION, TO WHICH CAUSES OF ACTION TRUTH WAS PLEADED AS AN AFFIRMATIVE DEFENSE.

1. Truth was pleaded as an affirmative defense to the first cause of action [alleged oral slanders] and to the third cause of action [allegedly causing publication of an article in the Riverside Daily Enterprise on March 23, 1956]. See Plaintiff's Exhibit 2—Pre-Trial Conference Order. [Tr. pp. 32-46.] Thus, the foregoing evidence of truth of the charges of adultery, referred to in Paragraphs A and B of specification II above, were clearly admissible under the said first and third causes of action.

The act of adultery, like any other fact, may be established by circumstantial proof. *Indeed, that is the usual way in which it is proven.*

Evans v. Evans, 41 Cal. 103;

Aston v. Aston, 14 Cal. App. 323, 111 Pac. 1035;

Wilson v. Wilson, 124 Cal. App. 655, 13 P. 2d 376.

Notwithstanding the denials of the parties, evidence of sexual inclination and reasonable opportunity is almost invariably accepted by the courts as sufficient proof of adultery.

Schaub v. Schaub, 71 Cal. App. 2d 467, 162 P. 2d 966.

2. With the agreement of the parties, the two cases, *Lyons v. Gilliland*, No. 20301-WM [on appeal herein] and *Meyers v. Gilliland*, No. 20302-WM [not on appeal] were tried together under Rule 42 and all evidence received in either case, which was applicable to both cases, was to be considered.

At the very outset of the trial, the following took place:

“The Court: I have been over the pretrial conference orders. I assume the originals have been signed. Have they?”

Mr. Murphey: That is my information, your Honor.

The Court: I assume that Judge Hall signed them. I haven’t seen the originals. I was only looking over the copies in my own file.

Are they signed, Mr. Clerk?

The Clerk: Yes, your Honor, they were signed on May 12th.

The Court: Your may proceed then, Mr. Hughes.

The clerk has handed me a stipulation as to certain facts in the Lyons case, Case No. 20301, signed by the parties.

Have any exhibits been marked?

Mr. Hughes: Just those attached to the pretrial order that are stated in the pretrial order, your Honor.

The Court: I don't believe they are stated to be marked. They are listed. Have any of them been marked by the clerk?

Mr. Hughes: No sir, they have not.

The Court: Do you wish to offer the stipulation in the Lyons case?

Mr. Hughes: I do.

Mr. Murphey: No objection.

The Court: Received in evidence. The clerk can file it and mark it Exhibit 1 in evidence." [The exhibit referred to was marked Pltf. Ex. 1 and received in evidence in Case No. 20301-WM.] [Tr. pp. 83-84.]

D. THE RECEIPT AND CONSIDERATION OF THE EVIDENCE OF TRUTH WAS, IF ERROR, HARMLESS. THE DISTRICT COURT WAS NOT REQUIRED AS A MATTER OF LAW TO FIND AND DID NOT FIND, ON THE ISSUE OF TRUTH.

In plaintiff's motion for new trial, under Paragraph III-F, she specified as a ground that the court failed to find on the truth or falsity of the alleged libelous statements set forth in the cross-complaint for divorce. Under Paragraph I of her motion for new trial, plaintiff specified the elimination by the court of the truth or falsity

of the alleged libelous statements from the issues to be tried. Appellant will proceed to demonstrate that such failure to find on this issue was, if error, harmless to the plaintiff as a matter of law.

The written findings of fact and conclusions of law provide, in material part, as follows:

“VI. It is true that in said action No. 62839, in the Superior Court of Riverside County, California, Ray Gilliland, as plaintiff, sued Elsinore Machris Gilliland, as defendant, for divorce; that by her cross-complaint therein, she sought a divorce against said Ray Gilliland on the grounds of extreme mental cruelty and adultery; that said cross-complaint was verified by defendant; that the allegations of said cross-complaint, complained of by plaintiff here, were material and relevant to the issues in said action.

VII. It is true that the aforesaid allegations were made by the defendant in good faith and without malice; that, at the time said allegations were made, the defendant did have good and sufficient reason to believe, and honestly and reasonably believed that said allegations were true and that the defendant, at said time, had reasonable and probable cause for believing the truth of said allegations; that the defendant did not publish said alleged libelous statements other than by filing the said cross-complaint in said divorce action; that said acts of defendant were privileged under the provisions of Section 47, subdiv. 2(3) of the Civil Code of the State of California.

VIII. It is not true that the plaintiff was damaged by said publication in said action No. 62839 in

the sum of \$500,000.00 or any other sum or sums as compensatory damages, or in the sum of \$500,000.00 or any other sum or sums as punitive damages.

IX. No specific defense of truth having been raised by the answer to the second cause of action, and no such issue having been set forth in the pre-trial conference order, Plaintiff's Exhibit 3 herein, the Court makes no finding of fact as to the truth of the allegations of the said cross-complaint in said action No. 62839." [Tr. pp. 50-51.]

"Conclusions of Law.

II. That the filing of said cross-complaint in action No. 62839 is a privileged publication under the provisions of Section 47, subdiv. 2(3) of the Civil Code of the State of California, and that by reason thereof defendant is not liable to plaintiff for said publication and that plaintiff take nothing by her second cause of action." [Tr. pp. 52-53.]

The defendant did not affirmatively plead as a special defense the truth of the allegations of said cross-complaint in Riverside Superior Court action No. 62839. *Truth*, as a defense to an action for libel or slander, *must* be affirmatively pleaded.

2 *Witkin*, Cal. Proc., Sec. 540;

30 Cal. Jur. 2d, Libel and Slander, Page 145, Page 769;

Davis v. Hearst, 160 Cal. 143, 187-194, 116 Pac. 530;

Stevens v. Snow, 191 Cal. 58, 64, 214 Pac. 968.

Thus, truth of the allegations of adultery was not put in issue by the pleadings under the plaintiff's second cause of action.

In addition, neither the plaintiff nor the defendant considered that truth or falsity or the allegations of the cross-complaint were in issue under plaintiff's second cause of action, at the time of the pre-trial conference order. Counsel for both parties agreed to the form of the pre-trial conference order and, in fact, the pre-trial conference order was offered in evidence by plaintiff and received as Plaintiff's Exhibit 2. [Tr. p. 90.] No issue of truth or falsity of the allegations of the cross-complaint for divorce charging plaintiff herein with adultery was stated in the pre-trial conference order. In fact, the pre-trial conference order [Pltf. Ex. 2] clearly states, in Paragraph V thereof:

"The following issues of fact, and no others, remain to be litigated upon the trial:

* * * * *

B. Second Cause of Action:

1. Were the allegations of the cross-complaint, filed by the defendant in said action No. 62839, in the Superior Court of Riverside County, California, privileged under the Provisions of Sec. 47, subdiv. 2(3) of the Civil Code of the State of California, which involves the following issues of fact:

(a) Were the said allegations, made by the defendant, made in good faith and without malice.

(b) At the time said allegations were made, did the defendant have good and sufficient reason to believe, and honestly and reasonably believe, that said allegations were true, and did defendant have reasonable probable cause for believing the truth of said allegations.

(c) Did the defendant publish said alleged libelous statement other than by filing the cross-complaint in said divorce action.

2. If the said allegations of said cross-complaint in said action No. 62839 were not privileged, was the plaintiff damaged thereby and the extent of such damage.” [Tr. pp. 41-43.]

Plaintiff thus has waived this issue and is precluded from asserting it.

Fed. Rules of Civ. Proc., Rule 16;

Fernandez v. United Fruit Co., 200 F. 2d 414 (1952);

McCarthy v. Lerner Stores Corp., 9 F. R. D. 31 (1949).

E. ASSUMING ARGUMENTUM THAT THE ISSUE OF TRUTH WAS PROPERLY RAISED BY THE PARTIES, THE COURT WAS NOT REQUIRED TO FIND ON THIS ISSUE AS A MATTER OF LAW.

To be a libel, the writing must be *both* false and unprivileged. *Civil Code of Calif.*, Sec. 45. Privilege is a complete defense and, if established, the truth or falsity is immaterial. Truth and privilege are separate and distinct defenses. The court can find and determine that the publication was privileged without making any finding as to truth or falsity of the publication.

Snively v. Record Pub. Co., 185 Cal. 565, 574, 198 Pac. 1 [note 5, involving privilege under subsec. (3) of Sec. 47 of the Cal. Civil Code];

Freeman v. Mills, 97 Cal. App. 2d 161, 217 P. 2d 687, involving privilege under subsec. (3) of Sec. 47 of the Cal. Civil Code.

In the *Snively* case, the California Supreme Court stated on page 574:

“(5) Since a libel is ‘a false and unprivileged publication’ (section 45), it follows that the publication

must be both false and unprivileged in order that it shall constitute an actionable libel. The allegation and proof that it is true in the sense intended constitute one defense. Allegations and proof that it was privileged upon any of the grounds set forth in section 47 also constitute a defense. The defense of privilege under subdivision 3 of section 47 does not depend at all on the truth of the defamatory charge. With respect to that form of qualified privilege the code does not require that the publication shall be true in order to bring it within the protection of the privilege. The language of the code clearly implies that the publication may be privileged, although it is untrue. To hold that it is necessary to allege and prove the truth of the charge in order to establish the defense that it was privileged under this subdivision would destroy the distinction between the defense of truth and the defense of privilege, and would render the defense of privilege entirely useless, since the proof that it was true would be a complete defense without proof of any other facts and without proving the absence of actual malice."

In the *Freeman* case, *supra*, which involved an appeal by plaintiff from a judgment of nonsuit in an action to recover damages for libel, the court said at page 165:

"A publication must be false *and* unprivileged in order that it shall constitute a libel [*Snively v. Record Publishing Co.*, 185 Cal. 565, 574 (198 P. 1)]. The court below, for the purpose of the motion for judgment of nonsuit was required to, and we must treat the publication as false. . . ."

Thus the defense of privilege does not depend at all on the truth of the defamatory charge and to hold, as

contended for by plaintiff, that a new trial should have been granted because the trial court refused to make a finding on truth or falsity, would render the defense of privilege useless. The publication may be privileged though untrue. If true, there is no need of the privilege because truth is a complete defense. To require a finding on truth or falsity when truth or falsity was not an issue, and where the finding could not possibly change the result, would be to require the trial court to make not only an improper but a useless finding.

Appellant submits the trial court did not err in refusing to determine the issue of truth or falsity, or to find upon same. The only grounds of plaintiff's motion for new trial remaining to be considered relate to Findings VII and VIII.

III.

If the District Court Granted the Motion on the Ground of Insufficiency of Evidence to Support the Finding of Privilege [Finding VII] the Decision Was a Gross Abuse of Discretion as There Was Ample Evidence to Support the Said Finding as a Matter of Law.

The cross-complaint containing the alleged libelous allegations, having been filed in the Superior Court of Riverside County, California, the California law applies. The substantive law of the state where the defamation takes place is applicable under the Rules of Decision Act.

Rules of Decision Act, 28 U. S. C. A. 1652;

30 Cal. Jur. 2d 684, Libel and Slander;

Gang v. Hughes, 111 Fed. Supp. 27.

The California Civil Code, Section 47, in its material part, reads as follows:

“A privileged publication . . . is one made in any . . . (2) judicial proceeding . . .; providing that an allegation . . . contained in any pleading filed in an action for divorce . . . made of or concerning a person by or against whom no affirmative relief is prayed in such action, shall not be a privileged publication . . . as to the person making said allegation . . . within the meaning of this section unless such pleading be verified and made without malice by one having reasonable and probable cause for believing the truth of such allegation . . . and unless such allegation . . . be material and relevant to the issues in such action.”

The parties hereto have admitted that the cross-complaint for divorce was verified by defendant and that the allegations were material and relevant to the issues of said action No. 62839 [See Pltf. Ex. 2, Pre-Trial Conference Order], leaving only the following issues of fact: (1) Were the allegations made by defendant *without malice*; and (2) did plaintiff have reasonable and probable cause for believing the truth of such allegations.

A. THE EVIDENCE CONCLUSIVELY SHOWS THERE WAS NO MALICE.

It is clear that the malice referred to in Section 47 of the Civil Code is actual malice, or malice in fact.

Davis v. Hearst, supra;

Snively v. Record Pub. Co., supra.

In the *Snively* case, the California Supreme Court stated at page 576:

“(8) The word ‘malice’ in the provisions of the Civil Code upon the subject of libel and slander means actual or express malice, as distinguished from that somewhat fictional form of malice sometimes described as ‘a wrongful act done intentionally without just cause or excuse’ or as ‘the absence of legal excuse.’ This was decided upon a very elaborate discussion of the subject in *Davis v. Hearst*, 160 Cal. 155 to 168 (116 Pac. 530). The court there held that ‘A full recovery in compensatory damages may be had under our civil law of libel without the pleading of malice, without the proof of malice, and without the existence of malice.’ The court was careful to say that it was here speaking of expressed malice or actual malice, and not of the fictional malice referred to which in some jurisdictions, but not in this state, is held to be a necessary ingredient of libel. With regard to actual or express malice, it was decided that it was material only where the plaintiff alleged it in the complaint as the foundation of a claim for punitive damages, or where the defendant in his answer alleged the absence of such malice as one of the necessary contentions of the defense that it was a privileged communication under one or more of the three varieties of qualified privilege described in subdivisions 3, 4 or 5 of section 47 of the Civil Code. Actual malice was there defined “as a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person,” and “. . . the motive and willingness to vex, harass, annoy or injure.” It was said that such actual malice could be established ‘either by direct proof of the state of mind

of the person, or by indirect evidence so satisfying to the jury that they may from it infer and find the existence of this malice in fact'; that the evidence 'may be direct . . ., going to declarations, acts and conduct of defendant, showing personal ill will toward the plaintiff, but it will more usually be indirect or inferred . . ., and to this end of proving malice inferentially all legitimate evidence is admissible bearing on the general course of conduct of the defendant toward the plaintiff, the internal evidence furnished by the character of the libel, and any other specific facts and circumstances not in direct proof of the malice, but from which the existence may be logically inferred, herein including the circumstances, if it be found to exist, of wanton recklessness and heedlessness of plaintiff's rights'."

In the instant case, there is no evidence at all that defendant, in making the allegations of her cross-complaint for divorce, was motivated by "hatred or ill will evidencing a willingness to vex, annoy or injure" the plaintiffs.

1. Direct proof of defendant's state of mind: The only direct proof of defendant's state of mind was produced by defendant herself. *This evidence is uncontradicted.* It is well established that, where relevant, intent or motive may be proved by the testimony of the party himself as to his own intent or motive. Thus, in an action for malicious prosecution, a party may testify that he acted in good faith, without malice, believing the plaintiff guilty.

Schubkegel v. Gordino, 56 Cal. App. 2d 667, 674, 133 P. 2d 475.

See also:

Fleet v. Tichenor, 156 Cal. 343, 104 Pac. 458,
involving an action for slander and testimony of
a party allowed as to absence of malice.

The uncontradicted testimony of defendant here is as follows:

“Q. [By Mr. Murphey]: Well, the time that you verified this cross-complaint, Mrs. Gilliland, did you bear Ann Meyers or Faye Lyons any ill will? A. No, I did not.

Q. Did you have any feeling of spite against either of them? A. No.

Q. Did you in your mind bear any vindictive enmity towards either of them? A. No.

Q. In filing this cross-complaint were you actuated by any wish or desire or design or purpose to injure Ann Meyers or Faye Lyons? A. No.

Q. Did you honestly believe the truth of the allegations of that cross-complaint? A. Yes.” [Tr. pp. 239-240.]

Defendant also testified that she did not even know plaintiff at the time of filing her cross-complaint for divorce.

Thus, there is no direct evidence going to declaration, facts or conduct of the defendant here, showing personal malice could reasonably or logically be inferred.

2. Indirect evidence of defendant's state of mind: There is no indirect evidence from which the existence of ill will towards the plaintiff.

B. PLAINTIFF HAD REASONABLE AND PROBABLE CAUSE FOR BELIEVING THE TRUTH OF THE ALLEGATIONS OF HER CROSS-COMPLAINT.

The following is a summary of the evidence within defendant's knowledge at the time of filing her cross-complaint:

1. Defendant testified in substance:

That Ray Gilliland told her before her marriage that he had been intimate with two women in Florida [Tr. pp. 97-98.] James Roche informed her in July, 1954, that Ray Gilliland had been intimate with two women named Virginia Brown, Marilyn Lee at Lake Tahoe in July, 1954; that Ray Gilliland stopped to see them at their home, went into their bedrooms with them and later came out, and that he gave them money. [Tr. pp. 232-234.]

She had information from others than Blanche Lampert and Mr. Gilliland that Faye Lyons would visit in his home in years previous to her marriage to Mr. Gilliland; that Faye Lyons was a guest of his in Oregon at his cabin up there. [Tr. p. 100.]

On January 2, 1955, she, Wm. L. Murphey and Mr. Maxwell Dorn went into Ray Gilliland's hide-away [home] at Scottsdale; that there was lipstick on a cup of partially consumed coffee, lipstick on a lighted cigarette; that Wm. L. Murphey told her he had seen a woman's face at the bedroom curtains as they approached the house; that she tried the bedroom door and it was locked from the inside; that she told Ray Gilliland "There is a woman in this house," and that Ray Gilliland replied "So what." [Tr. pp. 234-235.]

That people in the neighborhood told her there were women at Ray Gilliland's house all the time. That defendant, before verifying her cross-complaint, saw a photostatic copy of the registration of Ray Gilliland at the Colonial House, Las Vegas, Nevada, "Ray Gilliland and family." [Deft. Ex. E.]

That she had a conversation with Wm. L. Murphey, her attorney, on the subject-matter of the cross-complaint charging adultery. That, at the time of filing the cross-complaint, defendant did not know plaintiff. [Tr. p. 114.]

That she was present when Blanche Lampert's sworn statement was taken on November 2, 1955. [Pltf. Ex. 5, Tr. p. 96.]

2. Summary of Blanche Lampert's Statement, Plaintiff's Exhibit 5, made in the presence of Defendant:

In May 1955, Ray was keeping Faye Lyons up at Paradise Valley Guest Ranch. I cooked a steak dinner for them there. One night he got mad at some friends, Blake and Kent, and Ray Gilliland went up there and stayed all night at Paradise Valley Ranch, when Faye Lyons was there. Faye Lyons used to come down and stay until two or three o'clock in the morning at Ray Gilliland's house. They would sit there and drink together. Later, Mr. Gilliland and Faye Lyons went on a trip and came back. When they came back they brought Faye's boy with them. They got in a fight and Ray slapped her and she threw a glass at him—Faye Lyons broke a glass on him. When they came back she took the boy up to Paradise Valley Guest Ranch but she was down there at Ray Gilliland's house every day and I baby-sat with

the boy or one of the neighbors did until two or three o'clock in the morning. She was there from May to June, when she left. Ray Gilliland bought an automobile. I saw the title. He bought it on payments. Faye Lyons had it until he got mad at her and took it away from her. She drove it all the time. It was a Dodge; I think he bought it from Ed Spears.

At the trial, Blanche Lampert testified, in substance:

I told Mr. Murphey Faye Lyons and Ray Gilliland were going to Las Vegas. [Tr. pp. 215-216.]

Appellant submits that Finding VII was supported by a preponderance of the evidence: that Mrs. Gilliland knew of Ray Gilliland's sexual inclination and propensity toward other women; that Ray Gilliland and Faye Lyons had opportunity to commit adultery; that the defendant honestly and reasonably believed, in good faith, that Ray Gilliland had committed adultery with the plaintiff; that she had reasonable and probable cause for believing the truth of said allegations; and that she acted without malice toward the plaintiff in filing her said cross-complaint.

3. The trial court having properly found that the allegations of the cross-complaint were privileged, the trial court did not err in finding that plaintiff had not been damaged by the filing of said cross-complaint.

This is the last point [III-F] raised by plaintiff in her motion for new trial.

If the libelous statements were privileged, as found, no legal damage can result.

Faye Lyons, on cross-examination, testified, in substance:

Mr. Gilliland drove me from Fort Worth to Miami, stopping at hotels and motels; that Ray Gil-

liland registered and paid all the bills and for meals; that it was of no importance to her whether the rooms were adjoining or not. [Tr. pp. 197-198.]

Counsel for plaintiff admitted at the trial that any damage which plaintiff may have suffered was caused, to a considerable extent, by her own conduct. The following occurred at the conclusion of the evidence:

“The Court: What do you say to any consideration, if we reach that question, being given to the fact as to the second cause of action that plaintiffs may have brought some of the damage on themselves?

Mr. Hughes: In the second cause of action?

The Court: Yes. By giving the appearance that certain things were so, even though they were not?

Mr. Hughes: Well, your Honor, on that basis I call your attention to when a publication is not privileged, if the publisher had no probable cause for believing the truth of his statement or did not investigate the truth of the statement, he is liable.

The Court: Well, if a wife saw her husband traveling around with another woman, staying all night in hotels with him; if she made a technical error should she be penalized the same as if she made a substantial error?

In other words, what I am getting at is this: Assuming the same damage to reputation, would you seek this same award in a situation where the woman wasn't even at the hotel. And another case where the woman says, ‘Yes, I was in the adjoining room with him, but nothing happened. Why? Because nothing could happen.’

Would you award the same damages?

Mr. Hughes: The same amount?

The Court: Yes. They are both equally damaged in their reputation.

Mr. Hughes: I don't think I would, your Honor.

The Court: Well, that is what I am getting at. How much consideration should be given to the fact where a woman knowingly runs around with a married man, who is having divorce troubles with his wife, how much of that damage should be said to be brought upon herself.

Mr. Hughes: I am afraid quite a bit, your Honor.

The Court: It's a little bit like contributory negligence, isn't it?

Mr. Hughes: Well, is contributory negligence a defense?

The Court: No. I didn't mean the precise analogy. I meant like a person hurting himself. A woman who knows that a man is married, knows that litigation is going on between them, shouldn't it be said that she brought some of the damage on herself?

Mr. Hughes: I would say the measure of damage, the value of same, would be greatly reduced."

It is obvious that plaintiff violated the proprieties and had no regard for the results of her improprieties. Also, plaintiff's counsel admitted that any damage plaintiff might have suffered by the alleged libelous statement were greatly reduced by plaintiff's conduct.

F. Conclusion.

Appellant submits: (1) the District Court had no jurisdiction to grant the motion for new trial on the ground specified; (2) if it did have jurisdiction to grant said motion on the ground stated, it was a gross and prejudicial abuse of discretion; and (3) if the court granted the motion on the ground of insufficiency of evidence to support the finding of privilege [Finding VII], it was a gross abuse of discretion as there was a great preponderance of evidence to support the finding as a matter of law.

Therefore, the order granting the motion for new trial must be reversed and the judgment reinstated.

Respectfully submitted,

WM. L. MURPHEY and

JOHN B. ANSON,

By WM. L. MURPHEY,

Counsel for Appellant.

N. B. All emphasis is ours.

APPENDIX OF EXHIBITS

<u>Pltf's Ex. No.</u>	<u>Deft's Ex. No.</u>	<u>Identification</u>	<u>Offered at Tr. Page</u>	<u>Received at Tr. Page</u>
1		Stipulation of Facts	84	84
2		Pre-Trial Conference Order	90	90
3		Cross-Complaint for divorce, Action #62839	90	92
4		Page of Riverside Enterprise newspaper	108	108
5		Sworn statement of Blanche Lampert	212	212
6		Pages 41-43 of deposition of Elsinore Machris Gilliland	171	171
7		Complaint for annulment in Riverside action	174	175
8		Motel receipts	207	208
9		Conditional sales contract for Dodge automobile	209	209
10		Deposition of Ray Silverman	228	229
11		Deposition of Lenore Silver- man	228	229
12		Deposition of Frank W. Teich	229	229
13		Deposition of Mary Elizabeth Bailey	230	230
	A	Deposition of Ida Mae Barr	165	165
	B	Deposition of Faye Lyons	206	206
	C	Stipulated testimony of Clyde Williams	210	210
	E	Registration at Colonial House	240	240

NO. 16385

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELSINORE C. MACHRIS GILLILAND, also known as
ELSINORE MACHRIS GILLILAND,

Appellant,

vs

FAYE LYONS,

Appellee.

APPELLEE'S REPLY BRIEF

WELBURN MAYOCK
524 South Spring Street
Los Angeles 13, California

MORRIS LAVINE
620 Bartlett Building
215 West Seventh Street
Los Angeles 14, California

Attorneys for Appellee

FILED

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IN THE UNITED STATES COURT OF APPEALS
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ELSINORE MACHRIS GILLILAND,

Appellant,

vs

FAYE LYONS,

Appellee.

APPELLEE'S REPLY BRIEF

STATEMENT OF THE CASE

This is an appeal from an Order granting a new trial as to Plaintiff's second cause of action only in the above entitled case. The same Order denied a new trial as to causes of action one and three.

Cause of action number one was for slander. The court found that the defendant did not utter the alleged slanders and so did not reach the issue of truth which had been pleaded. (R. T. 48-49.)

Cause of action number three was for libel. The court found that defendant was not responsible for the libel published in the Riverside Daily Enterprise, so did not reach the issue

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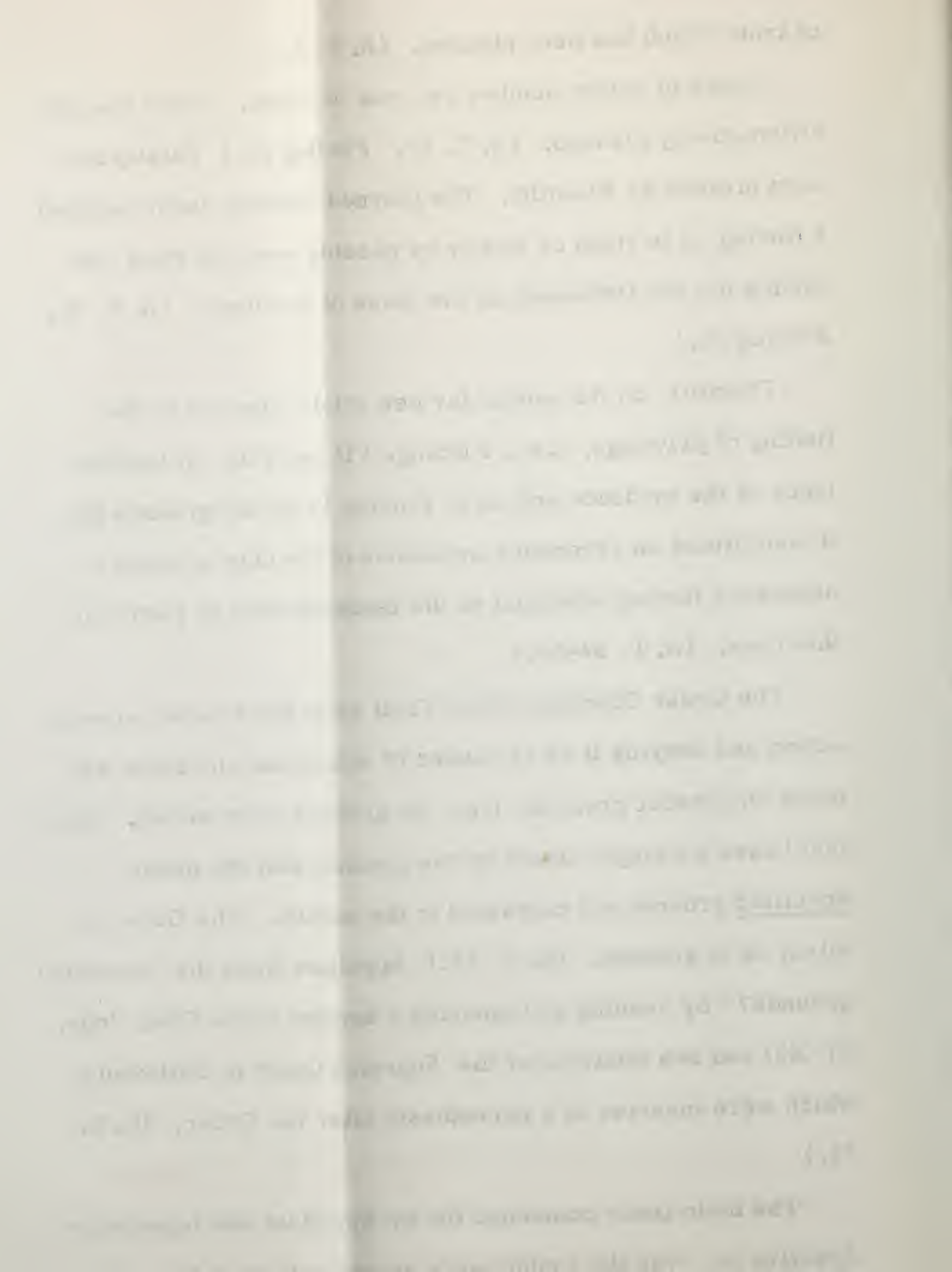
of truth which had been pleaded. (R.T. 52.)

Cause of action number two was for libel. Truth was not affirmatively pleaded. (R.T. 51. Finding IX.) Falsity had been pleaded by Plaintiff. The learned District Judge omitted a finding as to truth or falsity by passing over the point and finding for the Defendant on the issue of privilege. (R.T. 51. Finding IX.)

Plaintiff, on its motion for new trial, objected to the finding of privilege, i. e., Findings VII and VIII, on insufficiency of the evidence and as to Finding IX on the grounds that it constituted an erroneous avoidance of the duty to make a necessary finding essential to the establishment of justice in this case. (R.T. 54-55.)

The Order Granting a New Trial as to the second cause of action and denying it as to causes of action one and three was made on general grounds, i. e., no grounds were stated. Appellant bases its major attack on the grounds that the order specified grounds not contained in the motion. The Order is silent as to grounds. (R.T. 79.) Appellant finds the "specified grounds?" by reading and ignoring a section of the Civil Code, 47-2(3) and two citations of the Supreme Court of California which were inserted in a parenthesis after the Order. (R.T. 79.)

The main issue contended for by Appellant and opposed by Appellee is: Was the Order made on general grounds or were



specified grounds set forth in the Order.

Appellant presents three points for argument:

(1) That the District Court had no jurisdiction to grant the motion on the grounds specified.

(2) If it did have jurisdiction it was a gross and prejudicial abuse of discretion to do so.

(3) If the court granted a new trial on ground of insufficiency of the evidence to support finding of privilege (Finding VII) it was a gross abuse of discretion to do so.

Appellee will answer the points seriatim.

Point 1: Did the District Court have jurisdiction to grant the motion for new trial?

Appellant's argument falls with the fall of its major premise, i. e., that the Order was granted on a specified ground. It was not. (R.T. 79.)

The court granted the motion as to the second cause of action without specifying any grounds. (R.T. 79.)

The court denied the motion as to the first and second causes of action without specifying any grounds. (R.T. 79.)

The parenthetical citation of a Code section and two California cases cannot legally or logically be expanded into a specification of grounds. Whether the citations refer to the granting of the motion as to the second cause of action or the denial of the motion as to the first and third causes of

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action is a matter of conjecture and surmise although grammatical nicety indicates that since the first part of the compound sentence is separated from the second by both a comma and a conjunction, the parenthetical citations refer only to the next proceeding portion of the compound sentence and not to the first or more remote portion thereof. If it be held that the citations apply to both then appellant's argument falls by reason that it must stand for both the granting of the motion and the refusing to grant the motion as to the other two causes of action, which conflicts with appellant's legalistic assumption that the pages printed in the brief refer exclusively to a single legal point. This position is neither tenable nor true. Several matters are involved. The existence of three will disprove the assertion that there is only one as completely as a dozen.

(1) The whole subject of privilege is involved in the Code Section. The following two points at least are discussed in Davis v. Hearst, p. 195.

(2) In the absence of a plea of mitigation evidence of truth is properly excluded.

(3) When a plea in mitigation (privilege) is made only so much of the truth as the defendant knew at that time can avail him.

The first point is not involved in the case because Davis v. Hearst lacked a plea of mitigation or privilege, while in the instant case privilege was pleaded.

The second point may well be the point on which the court felt he erred, i. e., that he had taken into consideration everything produced at the trial to establish privilege when it was only so much as defendant knew at the time of publication which was available for consideration, to-wit: the Blanch Lampert Statement and certain information her husband had given her before they were married. (R.T. 96-101.)

This point was raised in the motion, in the memo of points and authorities and in the argument.

Appellant's citations to the effect that errors in the admission of evidence cannot be raised for the first time on appeal are proper statements of law but have no application. Appellee raised them before the trial court on her motion for a new trial and only defends on this appeal.

District Court had Jurisdiction

In giving the grounds for a motion for a new trial, no such particularity is required as is appropriate in a pleading.

Appellee's principal objections were directed to evidence, i. e., that certain named findings were not supported by the evidence. By evidence "legal evidence" was intended and the attack in argument was that there was not sufficient legal evidence to justify the finding. As a matter of law, evidence learned after publication cannot be used to support a plea of privilege. Davis v. Hearst, 160 Cal. 143, at 195. If there was not sufficient legal evidence, judged on this standard, to

support the finding, it was wholly within the learned judge's jurisdiction to recognize the fact and order a new trial. If he had erroneously considered evidence admissible on the other causes of action but unavailable to support a finding of "privilege" he could correct his error by ordering a new trial. In general when a trial court errs he has jurisdiction to correct his error on the motion for a new trial. The insufficiency of the "legal evidence" was a "ground" stated in the motion and the court had jurisdiction to consider that ground and all matters reasonably related thereto. To hold otherwise would be to initiate a new rule to the effect that legalisms and technicalities should restrict rather than that latitude should expand the powers of a trial court to correct his own errors on a motion for a new trial.

Our jurisprudence would suffer indeed if we supplanted the word "law" for the word "legalisms" so as to pervert the old maxim "Let law prevail though the heavens fall," into "Let Legalisms prevail though the heavens fall."

Summary of Point 1

(1) Appellant states that the Order on Motion for a New Trial (R. T. 79) was made on specified grounds. Appellee states that it was not. A reading of the ten lines which comprise the Order at page 79 of the transcript will be more convincing than an avalanche of words.

(2) Appellant contends that when an order is stated in

general terms but citations of authorities are parenthetically appended that a party may read the citations and speculate from them what the court was thinking about when he made the decision and then assert that the general words of the Order itself are restricted to a single ground.

(3) Appellant contends that in considering a Motion for a New Trial based upon insufficiency of the evidence to support a finding, the court may not reconsider its decision or change its mind.

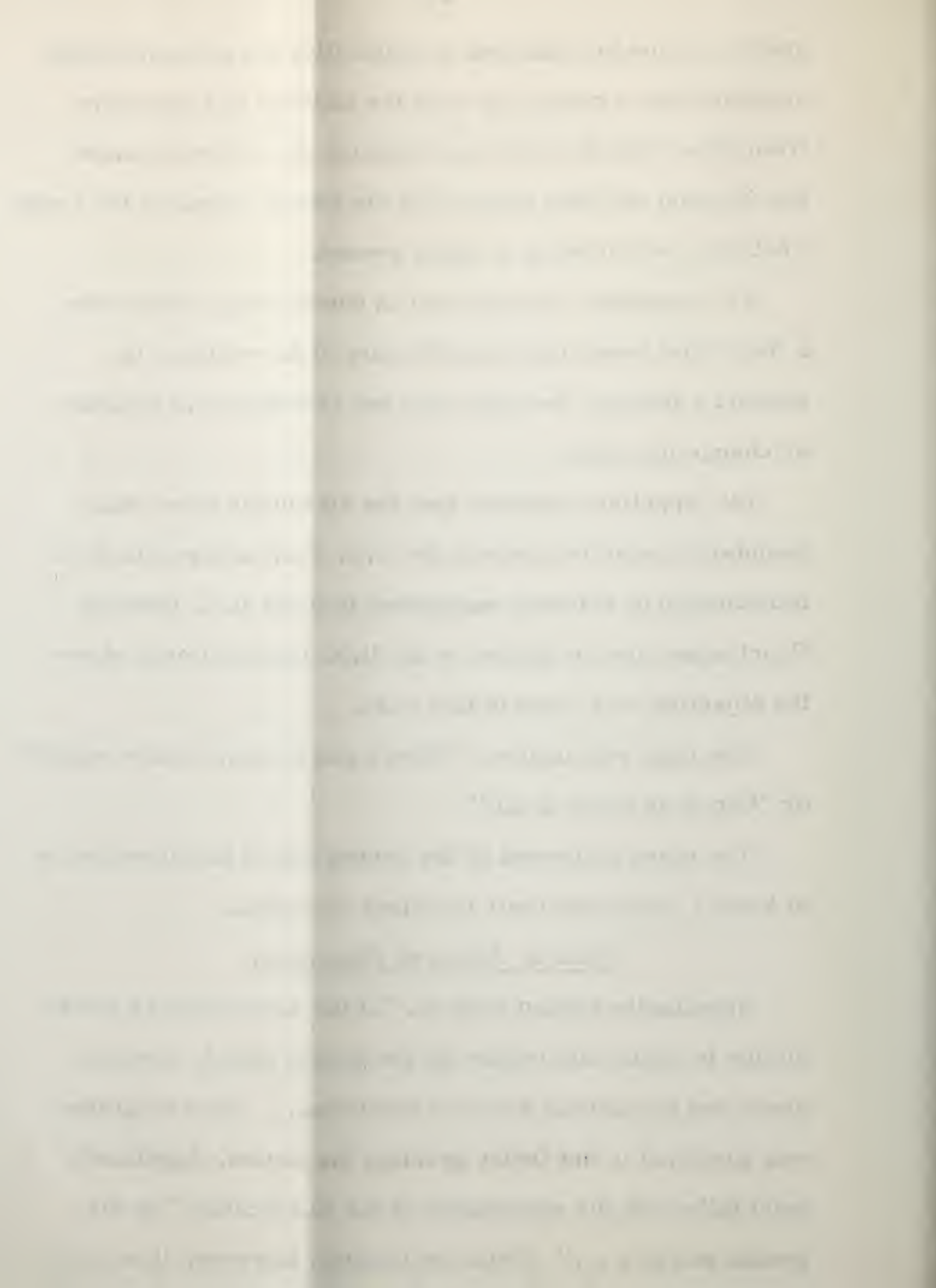
(4) Appellant contends that the rule to the effect that complaint cannot be made in the U.S. Court of Appeals to the introduction of evidence unobjected to in the U.S. District Court must also be applied in the U.S. District Court where the objection was made in this case.

One may well inquire, "Where can the objection be made?" or "Can it be made at all?"

The mere statement of the contentions of the Appellant as to Point 1 constitute their complete refutation.

Point 2: Abuse of Discretion.

Appellant's second point is, "if the court did have jurisdiction to grant said motion on the ground stated, it was a gross and prejudicial abuse of discretion." Since no ground was specified in the Order granting the motion, Appellant's point falls with the elimination of the qualification "on the ground stated . . ." From the heading, however, it is clear



that Appellant is still contending that counsel's own conclusion as to what the court was thinking about, gleaned from counsel's own speculation and surmise upon reading some citations, has become not only the sole and exclusive ground for the granting of the Order but has also become the "specified ground."

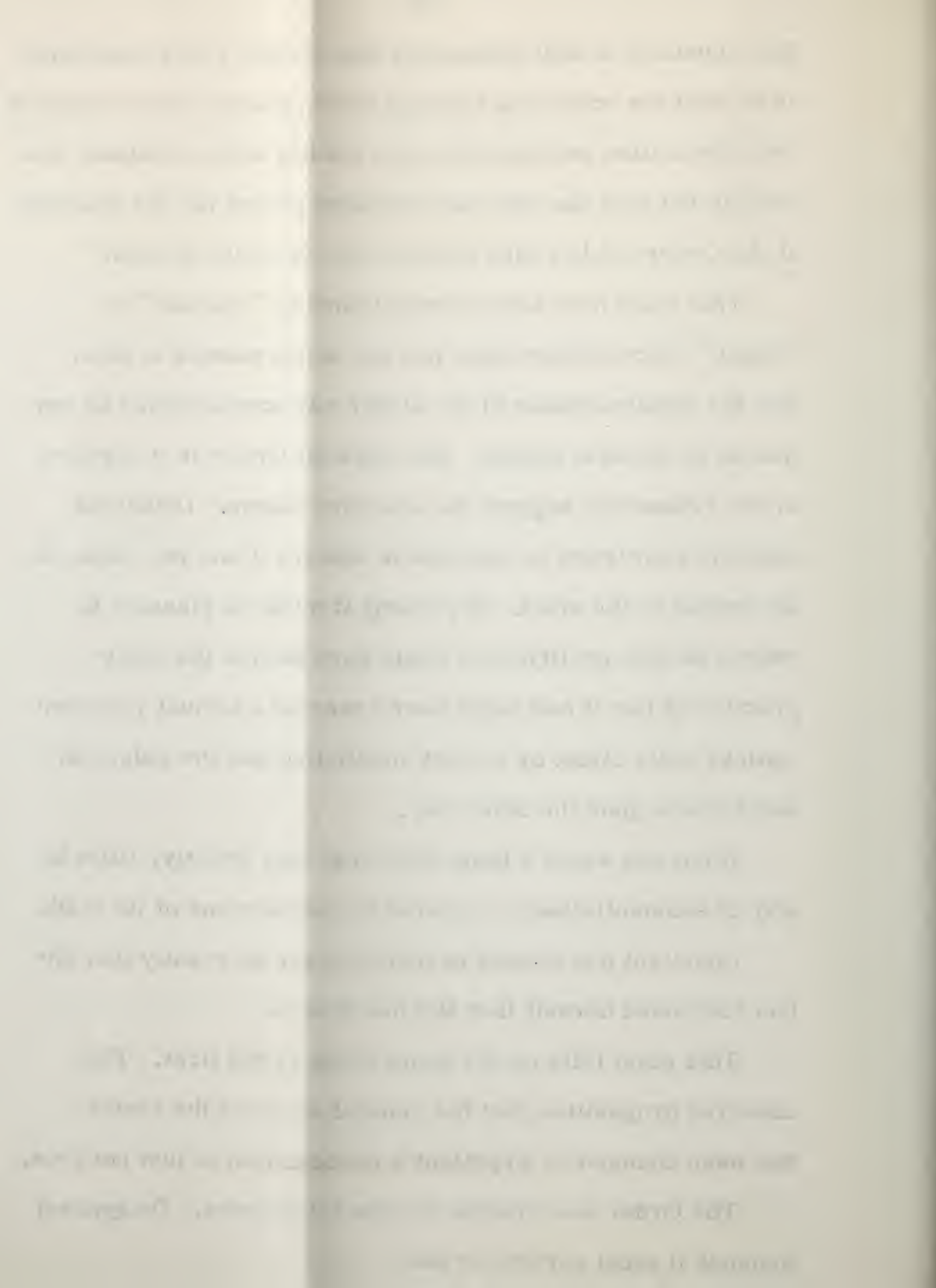
This must have been accomplished by "miracle" or "magic" since neither logic nor law are presented to show that the metamorphose of the Order was accomplished by any Human or Natural means. Nor does the Order as it appears in the Transcript suggest the asserted change. Doubtless esoteric knowledge is required to discern it and we, alas, do not belong to the elect. In passing it might be pleasant to reflect on how gratifying it would have been in the early practice of law if one could have reversed a factual judgment against one's client by merely meditating that the judgment should have gone the other way.

When one wants a thing to be true very greatly, little by way of substantiation is required to convince one of its truth.

Appellant has wished to find an error so greatly that she has convinced herself that she has done so.

This point falls on the same error as the first. The asserted proposition that the general words of the Order has been changed by Appellant's ratiocination is just not true.

The Order was granted on general grounds. On general grounds it must survive or fall.



Point 3.

This point needs no long discussion. Appellant contends that: "The Evidence Conclusively Shows There Was No Malice." The evidence quoted in Appellant's Opening Brief, page 45, constitute only the self serving exculpatory phrases of the accused and Appellant's position that this constitutes "conclusive evidence" is a massive absurdity.

The trial court was completely within its rights to have disbelieved her.

Evidence of malice, a subjective event, is best proved by conduct rather than by words.

In the Bhahagavad Gita, a part of the great Hindue epic Maha Bharata, 27 ways are given whereby one may know the "good" from the "evil" man. All apply to his observable conduct and none to his words.

In the Sermon on the Mount Christ twice warns against hypocrites and leaves the maxim "By their fruits ye shall know them." Matt. 7:20.

The Apostles James and John amplify with examples such as "Faith without works is dead" (James 2:20) and "Whosoever saith I know him and doeth not his works is a liar and the truth is not in him." 1 John 2:4.

Justin Martyr in his First Apology to Antoninus Pius writes:

"Justice requires that you inquire into the life

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both of the man who confesses and of him who denies that by his deeds it may be clear what kind of man he is."

Descartes, in his Essay on the Method of Rightly Conducting the Reasoning, states (Part III, par. 2):

" . . . it seemed to me most expedient to bring my conduct into harmony with the ideas of those with whom I would have to live; and that in order to ascertain that these were their real opinions I should observe what they did rather than what they said."

The famous Judgment of Solomon (I Kings 3:16-28) was accomplished by a ruse in which the liar was entrapped by conduct in conflict with her plea.

Our poets and writers have so copiously treated this theme that any exhaustive statement would surpass the scholarship of the writer and exceed the necessities of a brief.

We might reflect that it was by provoking the king into conduct by the "play" that Hamlet revealed the "conscience of the King," and it was by contrasting the deeds of Cordelia with the words of her hypocritical and ungrateful sisters that Shakespear enobled the heroine of the Tragedy of King Lear.

The considered wisdom of the ages, of which a few examples have been given, has been recognized in California

the first of the following three cases will be the

one in which the number of elements is even.

Let n be even.

Let $n = 2m$. Then the number of elements is

even, and the number of elements is $2m$.

Let $n = 2m + 1$. Then the number of elements is

odd, and the number of elements is $2m + 1$.

Let $n = 2m + 2$. Then the number of elements is

even, and the number of elements is $2m + 2$.

Let $n = 2m + 3$. Then the number of elements is

odd.

Let $n = 2m + 4$. Then the number of elements is

even, and the number of elements is $2m + 4$.

Let $n = 2m + 5$. Then the number of elements is

odd, and the number of elements is $2m + 5$.

Let $n = 2m + 6$. Then the number of elements is

even, and the number of elements is $2m + 6$.

Let $n = 2m + 7$. Then the number of elements is

odd, and the number of elements is $2m + 7$.

Let $n = 2m + 8$. Then the number of elements is

even, and the number of elements is $2m + 8$.

Let $n = 2m + 9$. Then the number of elements is

odd.

Let $n = 2m + 10$. Then the number of elements is

even, and the number of elements is $2m + 10$.

Jurisprudence, which is applicable in this cause.

Subjective events such as "intent" or "malice" are usually not susceptible of direct proof but may be ascertained from subsequent conduct and speech.

See Law note: 23 Cal. Jur. 2d §80, p. 202.

Tench v. McMeekan, 17 Cal. App. 14.

Holiday v. Tolosano, 39 Cal. App. 151-53.

While "intent" and not "malice" were involved, "malice" is included in the general term "intent" as constituting a particular type of intent, i. e., an evil one. The rules of evidence as to "intent" in general apply to "malice" as well.

Let us now examine a few things that Appellant did, in contrast to what she said.

(1) She swore to the truth of accusations of adultery with particularity as to time and place on the sole evidentiary basis of the Blanch Lampert Statement. The statement made no charge of adultery by Appellee, conflicted with the accusation as to time and place and did not contain data from which adultery could be reasonably inferred.

(2) She made no effort to serve Appellee although she knew her address. This is only compatible with the inference that it was made to hurt Appellee by urging an unsubstantiated vilification which she had no intention of proving.

(3) She made no attempt to secure substituted service as provided in Sec. 1019, C. C. P. This shows that her

vilification was so untrue that she knew from the start it was false, that it couldn't be proved but that it would hurt her husband and Appellee.

(4) She made no attempt to prove adultery at the trial. Again we have the complete abandonment of the accusation after its purpose, i. e., to vilify and injure Appellee, had been accomplished.

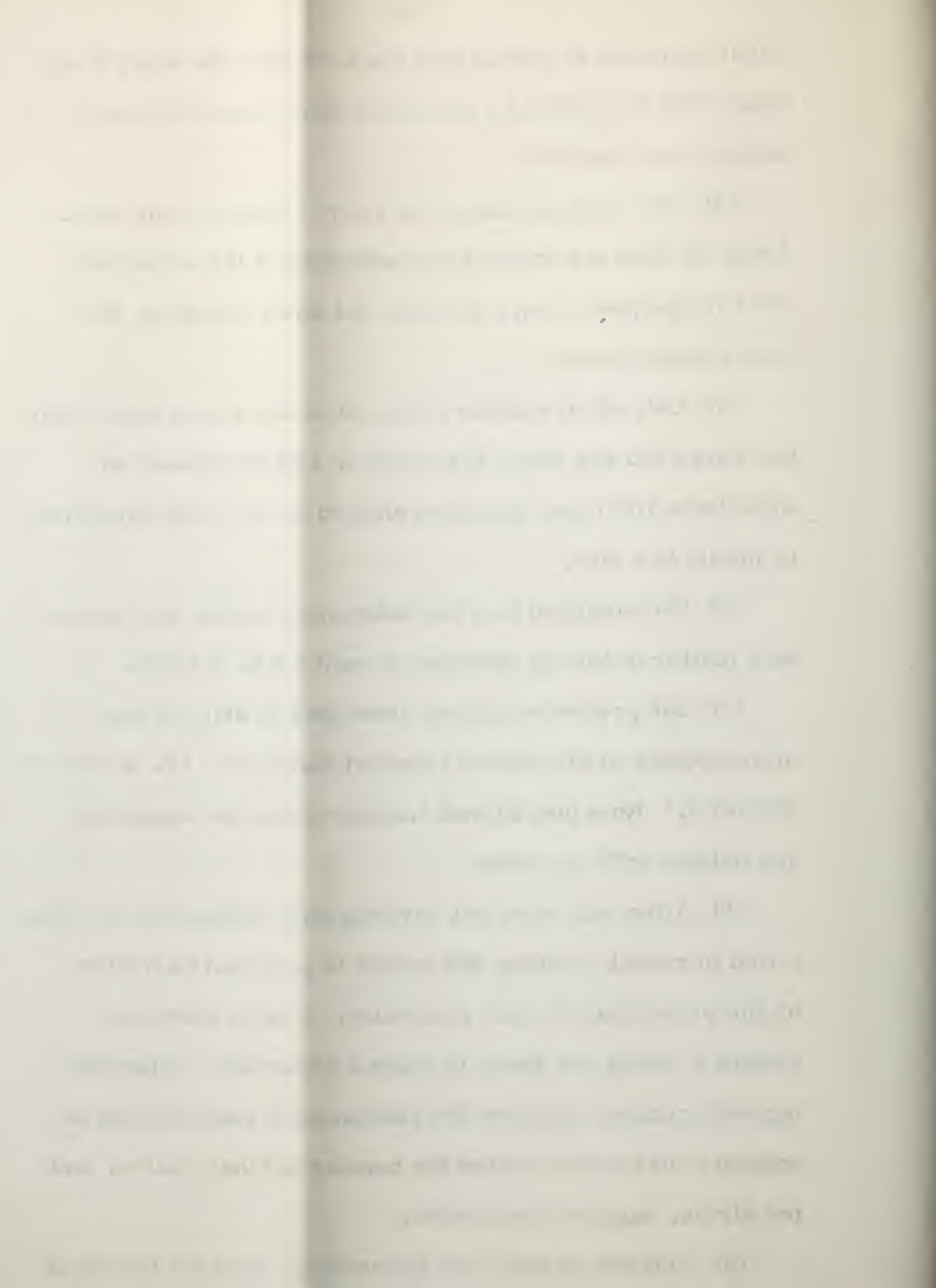
(5) Only when suit for libel and an attack was made upon her purse did she scour the nation to seek for phases in Appellee's life from childhood onward so as to find something to justify her slur.

(6) She admitted that the defamatory matter was untrue as a matter of law by choosing to omit a plea of truth.

(7) She pretended injured innocence by self serving interruptions in the Blanch Lampert Statement. (P. 4 thereof, Exhibit 5.) Note how Blanch Lampert takes the suggestion and obliges with an assist.

(8) After suit when her investigation, nationwide in scope, failed to reveal adultery she sought to perpetuate her slur by the protection of court procedure. A noble character admits a wrong and seeks to make a reparation. When the opposite conduct is shown the conclusion is justified that an opposite character dictated the conduct and that malice, and not virtue, supplied the motive.

(9) And now in this very proceeding, when the terror of



a monetary loss again enters her mind, she again seeks to perpetuate her unproven slur by fighting to prevent the pitiful attempt of a mother to recapture a few shreds of reputation for the consolation of her little son.

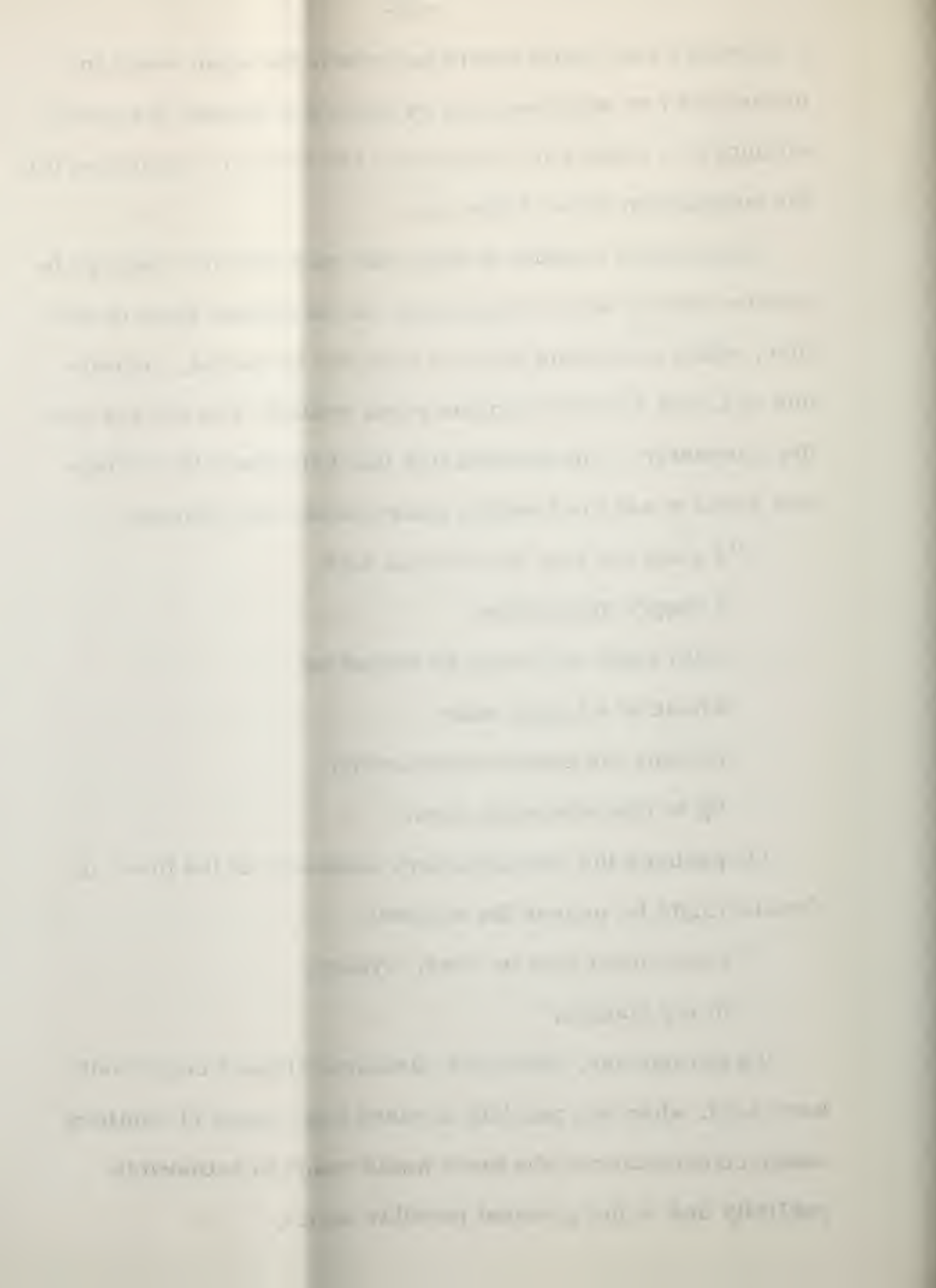
Appellant's conduct in doing the most complete damage to another woman which is possible, in our present state of culture, while protesting that she bore her no malice, reminds one of Lewis Carrol's famous poem entitled "The Walrus and the Carpenter," and particularly that part where the Walrus was about to eat his trusting little friends, the Oysters:

"I weep for you, the Walrus said,
I deeply sympathize
With sighs and tears he sorted out
Those of a larger size
Holding his pocket handkerchief
Up to his streaming eyes."

Or perhaps the unsatisfactory assurance of the lover in Cynara might be nearer the subject:

"I have been true to Thee, Cynara,
In my fashion."

To paraphrase, Appellant Elsinore Gilliland might well have said, when she publicly accused Faye Lyons of adultery under circumstances she knew would result in nationwide publicity and in the greatest possible injury,



"I am protecting your reputation, Faye

In my fashion."

In dealing with malice Appellee prefers the guidance of the maxim "By their fruits ye shall know them" to that afforded by the self serving declaration of the Appellant that "she bore no malice whatever."

Malice Inferred

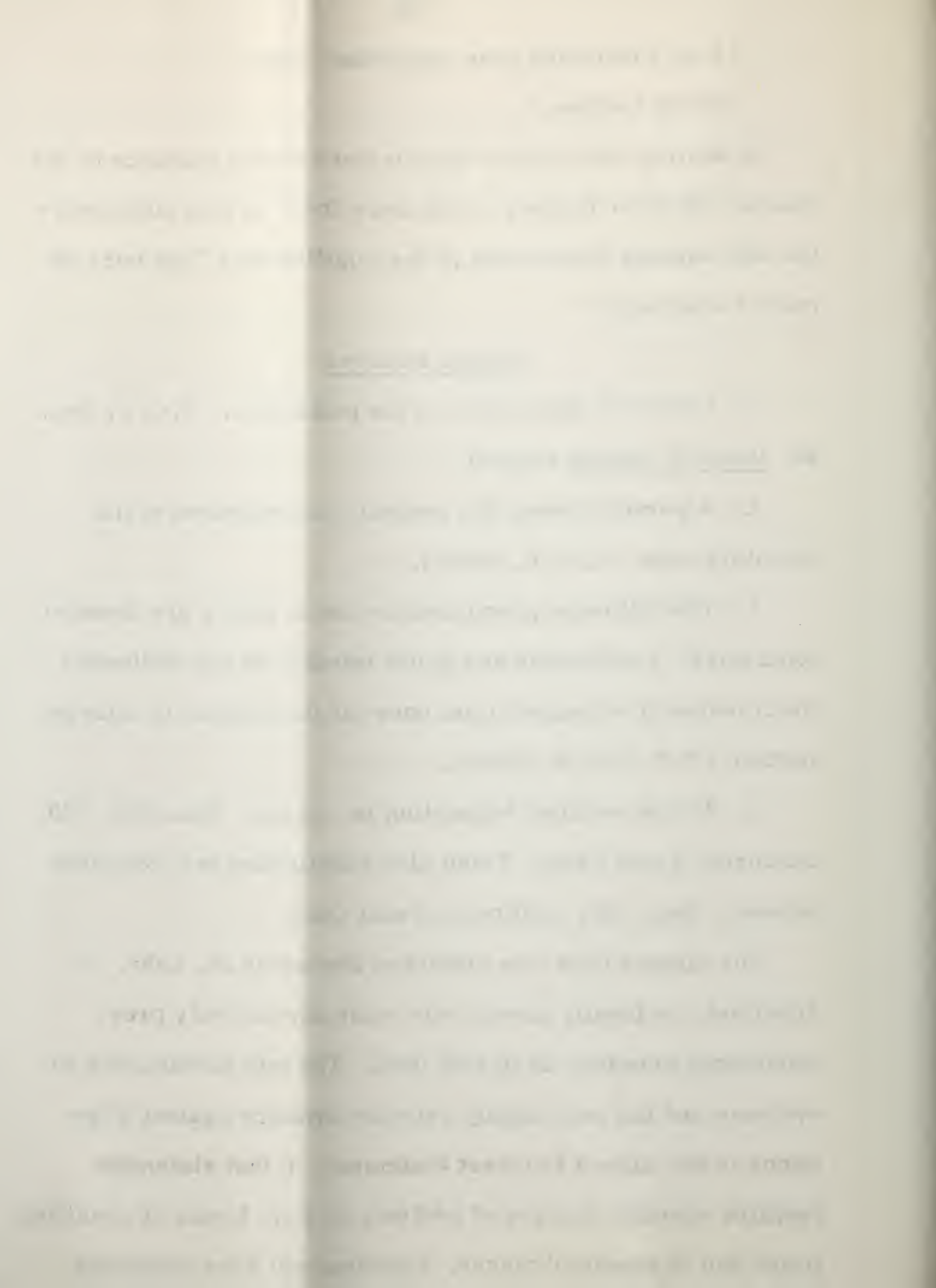
1. Malice is inferred from the publication. C.C.C. Sec. 48, Davis v. Hearst (supra).

2. A person intends the ordinary consequences of his voluntary acts. C.C.P. 1963:3.

3. The following presumptions and no others are deemed conclusive: a malicious and guilty intent from the deliberate commission of an unlawful act done for the purpose of injuring another * * * C.C.P. 1962:1.

4. A true or false defamation is a crime. Sec. 248, 249, California Penal Code. Truth plus justification is a complete defense. Sec. 251, California Penal Code.

The alleged libel was published November 26, 1955. If Appellant can legally prevail she must affirmatively prove conditional privilege as of that date. The only justification in evidence and the sole legally relevant evidence against Faye Lyons is the Blanch Lampert Statement. If that statement justifies specific charges of adultery by Faye Lyons at specified times and in specified places, Appellant will have sustained



the burden of proof as to privilege. If that statement does not justify specific charges of adultery by Faye Lyons at specific times and in specific places, defendant has not proved privilege and the decision is erroneous.

A Finding of Falsity was Essential

The court erred in failing to find that the defamatory matter was false. This was specifically urged in the Motion for New Trial. (R. T. 55, Finding IX.)

Appellee pleaded the falsity of the defamatory matter.

Appellant failed to plead truth.

As a matter of law falsity stands admitted.

Falsity constitutes a material element of civil libel and requires a finding. None was made. This constituted error. The learned judge corrected by granting a new trial.

A finding against a material admission in a pleading is a ground for reversal.

Estate of Cover, 188 Cal. 133.

Faulkner v. Rondoni, 104 Cal. 140.

Romer v. Wehner, 61 Cal.App. 411.

Finding X is against a material admission and constituted ground for reversal. Appellee's right to a finding of falsity was not satisfied by a finding which leaves the matter in doubt. An honest woman and a woman of doubtful reputation are not the same thing.

"For every wrong there is a remedy." This maxim was

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intoned by the juris-consults of ancient Rome, has been enshrined in the Pandects of the monumental Code of Justinian and has been rewritten as Section 3523 of the Civil Code of the State of California.

To falsely accuse a woman of adultery is a wrong. If it is done under conditions of privilege, the wrong is not removed. The legal remedy, however, has been seriously impaired. Like the owner of an outlawed note, the right remains, but the remedy is withheld. Since the reign of Theodosius II, matters of public policy have justified the withholding of the remedy, leaving the right unimpaired. Considerations of Public Policy also impelled the statutory doctrine of privilege, but only insofar as immunity of the libellant was concerned. Insofar as power still remains in a court to do justice and let right prevail, it is the obligation of the court to do it. If some of the value of reputation can be salvaged by a judicial finding of the falsity of the charge, a court cannot legally escape its obligation to Appellee by withholding this available form of relief. The learned District Court quickly corrected this error when it was pointed out by granting a new trial.

Conclusion

Because Appellant's legalistic arguments are without merit;

Because a trial court should be allowed to correct its revealed errors on motion for a new trial and should be given

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latitude in which to do so;

Because a new trial is manifestly necessary to establish justice in this cause;

The Order granting a New Trial should be affirmed.

Respectfully submitted,

WELBURN MAYOCK and
MORRIS LAVINE

By
WELBURN MAYOCK
Attorneys for Appellee

No. 16385

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELSINORE C. MACHRIS GILLILAND, also known as
ELSINORE MACHRIS GILLILAND,

Appellant,

vs.

FAYE LYONS,

Appellee.

APPELLANT'S REPLY BRIEF.

WM. L. MURPHEY, and
JOHN B. ANSON,

458 South Spring Street,
Los Angeles 13, California,

Counsel for Appellant.

FILED

OCT 27 1959

PAUL P. O'BRIEN, CLERK

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APPELLANT'S REPLY BRIEF.

I.

Appellee Is Deemed to Have Admitted That the District Court Had Jurisdiction of the Case and This Honorable Court Has Jurisdiction of the Subject Matter of This Appeal.

Under sub-paragraphs 1 and 2 of topic "A" of Appellant's Opening Brief, appellant cited authority in support of jurisdiction. Appellee has not contended nor cited authority to the contrary, and thus may be deemed to have conceded these points.

II.

Appellee's Contention That the Motion for New Trial Was Granted on Grounds Stated in the Motion Is Contrary to a Reasonable Interpretation of the Order.

Appellee's major contention appears to be that the Trial Judge granted a new trial as to the second cause of action without specification of any particular ground therefor, and thereby relied on the grounds raised in appellee's

motion, *e. g.*, insufficiency of the evidence to support certain findings.

However, a reasonable interpretation of the order granting the new trial shows that this contention is erroneous. At the outset it should be noted that, where the order is made upon a ground stated in the motion, the Trial Judge is not required to specify the basis for the order since the grounds are fully set forth in the motion.

Federal Rules of Civil Procedure, Rule 59;

Fine v. Paramount Pictures, 181 F. 2d 300;

Freid v. McGrath, 133 F. 2d 350.

But where the basis for the order does not appear in the motion, the Court is obliged to set forth the ground relied upon.

Federal Rules of Civil Procedure, Rule 59(d).

Thus, appellee's major contention presupposes that the Trial Judge performed an idle act in repeating a ground already fully set forth in the motion. This would defy logic and reason.

Here, the Trial Judge set forth the basic statute involved (*Cal. Civ. Code*, Sec. 47, Subd. 2(3)) together with specific page references to *Davis v. Hearst*, 160 Cal. 143 and *Tingley v. Times-Mirror Co.*, 151 Cal. 1. Neither of these cases involved a question of sufficiency of the evidence. On the contrary, both cases resolve questions as to admissibility of evidence at the pages cited by the Trial Judge.

Thus, appellee's major contention would assume that the Trial Court cited page references to two cases which were not applicable to the ground relied upon for the order. This theory does an injustice to the Trial Judge.

Appellant contends that the Trial Court felt that error had been committed in the introduction of evidence on the second cause of action, and purported to remedy this error by ordering a new trial. (It should be noted that appellant does not believe there was error in the receipt of evidence, even though it does not appear essential to decide this question at this point). This the Court had full authority to do, so long as it acted within the 10-day period required under the rules. Upon expiration of the time allowed, this ground was no longer available as a basis for granting a new trial.

There is no reason why a Trial Court may not set forth the basis for its ruling by reference to reported cases and statutes. In fact, appellant believes this is a common method of directing counsel's attention to the legal points relied upon. Thus, in the present case, the only logical and consistent interpretation of the Trial Court's order would be that the Court specified a ground not stated in appellee's motion for a new trial.

Appellee further contends (Appellee's Reply Brief, pp. 4-5) that the case of *Davis v. Hearst, supra*, involved the following two points:

1. In the absence of a plea in mitigation, evidence of truth is properly excluded; and
2. When a plea of mitigation is made, only so much of the truth as the defendant knew at that time can avail him.

Appellee dismisses the first point by stating that *Davis v. Hearst* lacked a plea in mitigation, while in the present case privilege was pleaded. However, a plea of mitigation was made in *Davis v. Hearst*. At page 154 of that case, it is shown that the answer alleged facts in mitigation in that Mr. Hearst was absent from the city at the time

of the publication and that he employed careful and skilled men to run the newspaper in his absence. It is clear that the type of mitigation present in that case is quite different from the privilege raised in the present case. In the *Davis v. Hearst* case, the facts alleged going to mitigation had no relation to the truth of the charges while, in the present case, the evidence going to privilege may have tended to prove the truth. However, the issue of the propriety of admitting evidence going to the truth of the defamation, where facts in mitigation are pleaded, was squarely before the Court in *Davis v. Hearst, supra*.

Appellee fails to mention the case of *Tingley v. Times-Mirror, supra*, also cited by the Court in the order granting a new trial. In that case, the Court excluded evidence going to the issue of truth and privilege. The Court held that no plea had been made that the defamation was true, so the evidence was properly excluded as to that issue. Further, it held that the facts pleaded were insufficient, as a matter of law, to constitute a plea in mitigation. Hence, the evidence offered was inadmissible on either issue since neither defense had been properly raised. Thus, the issue of error in exclusion of evidence was necessary to the decision in *Tingley v. Times-Mirror, supra*. Hence, it follows that the Trial Judge must have cited this case for his position that evidence of truth had been improperly received.

Appellee also urges that the Trial Court "may well" have felt he erred in considering all evidence produced at the trial, although only so much as was known to appellant was available for consideration on the second cause of action. Of course, even where objected to, the admission of irrelevant or immaterial evidence normally will not be grounds for a reversal where the case is

tried by the Court. (*White v. White*, 82 Cal. 427, 452 (1890).) The Trial Judge is presumed to have considered only relevant and material evidence. Thus, the error the Court must have considered, if appellee's point is well taken, is that evidence was erroneously admitted on the second cause of action. This, of course, is one of appellant's principal contentions.

III.

Appellee's Contentions That Malice Was Proved and a Finding of Falsity Was Required Are Not Supported by the Record.

Appellee claims (Appellee's Reply Brief, p. 9, Point 3) that there was ample evidence to support a finding of malice as used in *Civil Code*, Sec. 47, Subd. 2 (3). Clearly, the only *direct* evidence of malice was the testimony of appellant set forth at page 45 of Appellant's Opening Brief. This evidence directly negatives the existence of express malice required by the law of privilege.

Certainly this evidence may be overcome by indirect evidence going to appellant's state of mind. However, if the indirect evidence in the record is insufficient, as a matter of law, to show the existence of express malice, the Court is left with the uncontradicted direct evidence of lack of express malice. That is the state of the record here. Appellee's claim that express malice was shown is in error.

In addition to a journey through ancient literature, appellee has set forth the evidence which allegedly controverts appellant's direct evidence (Appellee's Reply Brief pp. 11-13). Appellant will show that the evidence cited by appellee, which is in the record, is entirely insufficient, as a matter of law, to prove express malice.

1. It is claimed (Appellee's Reply Brief, p. 11) that appellant "swore to the truth of accusations of adultery with particularity as to time and place on the sole evidentiary basis of the Blanch Lampert Statement." On the contrary, appellant executed the cross-complaint on the basis of the evidence set forth at pages 46-48 of Appellant's Opening Brief. There was a great deal of evidence besides the Lampert Statement within appellant's knowledge at that time, and it was found that she had reasonable and probable cause for her belief.

2. Appellee claims (Appellee's Reply Brief, p. 11) that appellant made no effort to serve appellee "although she knew her address." Nowhere in the record does it appear that appellant knew appellee's address at that time. In fact, appellant testified that she did not know appellee at all.

3. Appellee claims (Appellee's Reply Brief, pp. 11-12) that no attempt was made to obtain substituted service. This, of course, is true.

4. It is urged (Appellee's Reply Brief, p. 12) that appellant made no attempt to prove adultery at the trial. This is not correct. This issue was fully tried and contested under all three causes of action. Under the second cause of action, appellant did not plead truth as a special defense, and it would have been improper to present evidence of the truth if objected to. It was not objected to. Appellee specifically offered evidence on this issue at the trial.

5. It is claimed (Appellee's Reply Brief, p. 12) that appellant scoured the nation to find phases of appellee's life to find justification for the alleged libel. Appellant has searched the record in vain for any such evidence. None was found since no such evidence was produced by either party.

6. Appellee says (Appellee's Reply Brief, p. 12) that appellant admitted the alleged defamation was false by omitting a plea of truth. Again appellee declines to recognize the existence of *Snively v. Record Pub. Co.*, 185 Cal. 565, which holds that it is not required that truth be shown or even considered in order to prove the existence of privilege. If the defense of privilege is established, the truth or falsity of the libel is immaterial.

7. It is claimed (Appellee's Reply Brief, p. 12) that appellant's remarks at the time of taking the Lampert Statement constitute evidence of express malice. At two points during the taking of this statement, appellant interjected remarks. Neither of these remarks has any inference or hint of a malicious state of mind toward appellee or, for that matter, against anyone else. Appellee was not even under discussion by Mrs. Lampert at that point. These remarks have no evidentiary value whatsoever on the issue of appellant's state of mind toward appellee.

8. Appellee next makes the extraordinary claim (Appellee's Reply Brief, p. 12) that, by resisting the claim for damages, appellant has evidenced an ill-will toward appellee. It will truly be a sad day for jurisprudence if the defense of a lawsuit becomes evidence of malice, which is in issue in the very same litigation.

9. Appellee further asserts (Appellee's Reply Brief, pp. 12 and 13) that the present appeal taken by appellant is proof of her malice. It should suffice to remark that this theory is without support of either logic or law.

It thus appears that appellee's alleged indirect evidence of express malice is either outside of the present record or an assumed inference from facts which do not have any evidentiary weight as to appellant's state of mind. In

short, the evidence relied on by appellee is entirely insufficient, as a matter of law, to show malice. Hence, appellant's direct evidence of her lack of malice stands alone and requires a finding in accordnace therewith.

Appellee's final point (Appellee's Reply Brief, p. 15) is that "A Finding of Falsity was Essential." Nowhere does appellee discuss or refer to *Snively v. Record Pub. Co.*, *supra*, which holds directly contrary to appellee's position, *e. g.*, that it is not necessary to allege and prove the truth of the charge in order to show the defense of privilege; otherwise, the defense of privilege would be renendered useless. Even though appellee chooses to ignore this case, appellant submits it represents the law on this matter and should be followed by this Court.

Conclusion.

Appellant submits: [1] the District Court had no jurisdiction to grant the motion for new trial on the ground specified; [2] if it did have jurisdiction to grant said motion on the ground stated, it was a gross and prejudicial abuse of discretion; and [3] if the Court granted the motion on the ground of insufficiency of evidence to support the finding of privilege [Finding VII], it was a gross abuse of discretion as there was a great preponderance of evidence to support the finding as a matter of law.

Therefore, the order granting the motion for new trial must be reversed and the judgment reinstated.

Respectfully submitted,

WM. L. MURPHEY, and

JOHN B. ANSON,

By WM. L. MURPHEY,

Counsel for Appellant.

No. 16388

SEE ALSO B/08

United States
Court of Appeals
for the Ninth Circuit

GRACE & CO. (Pacific Coast), a Corporation,
Appellant,

vs.

THE CITY OF LOS ANGELES, et al.,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

AUG 13 1959

PAUL E. DARTEN, CLERK

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

McCUTCHEN, BLACK, HARNAGEL &
SHEA,
PHILLIP K. VERLEGER,
HOWARD J. PRIVETT,
650 Roosevelt Building,
727 West 7th Street,
Los Angeles 17, California.

For Appellee:

TRIPPET, YOAKUM AND BALLANTYNE,
FRANK B. YOAKUM, JR.,
458 So. Spring Street,
Los Angeles, California;
ROGER ARNEBERGH,
Los Angeles City Attorney;
C. N. PERKINS,
Deputy City Attorney,
Post Office Box 151,
San Pedro, California.

In the District Court of the United States for the
Southern District of California, Central Division
Civil No. 20624-HW

GRACE & CO. (Pacific Coast), a Corporation,
Plaintiff,
vs.

THE CITY OF LOS ANGELES, a Municipal
Corporation; OUTER HARBOR DOCK AND
WHARF CO., a California Corporation; and
DOES 1 THROUGH 21, Individuals and Cor-
porations,
Defendants.

AMENDED COMPLAINT
(For Damages)

Plaintiff Grace & Co. (Pacific Coast), a corpora-
tion, complains of defendants above named, and for
cause of action alleges:

I.

Plaintiff Grace & Co. (Pacific Coast), is a cor-
poration, organized under the laws of the State of
West Virginia, and duly qualified to do business in
the State of California. Defendant, The City of
Los Angeles, is a municipal corporation, existing
under the laws of the State of California. Defend-
ant, Outer Harbor Dock and Wharf Co. is a cor-
poration, duly organized under the laws of the State
of California. Defendants Does 1 through 21 are
individuals and/or corporations, citizens of or resi-
dents [2*] of California, whose true names are

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

unknown to plaintiff, and who are therefore sued by said fictitious names, who participated in and are jointly liable with the defendants herein by reason of the evidence hereinafter alleged.

II.

Jurisdiction herein exists under Section 1332 of the United States Code by virtue of the fact that this is an action between citizens of different States of the United States, involving in excess of \$3,000.00.

III.

That defendant, The City of Los Angeles is, and at all times alleged herein, was the owner of Berth 59, Los Angeles Harbor and, together with defendant Outer Harbor Dock and Wharf Co., the operator of a certain steel and concrete shed at Berth 59 in that portion of Los Angeles known as San Pedro. That defendants provided the said shed for the receipt of merchandise in transit from various portions of the United States and of the world to various other portions of the United States and the world, said facilities being provided for hire. That said shed is so used to hold goods which have been brought to Los Angeles by ship while awaiting delivery of the same to the owners thereof. That in the course of said business, the aforesaid defendants occupy with respect to the owners of said goods at various times the position of carriers and/or warehousemen and are subject first to the legal obligations placed by the law upon carriers by sea,

and second to those placed upon warehousemen of goods which have been delivered to the port of destination by the said carriers by sea.

IV.

Plaintiff, Grace & Co. (Pacific Coast) was at all times hereinafter stated the owner of approximately 1,960 bags of coffee, the product of various South and Central American countries, which said coffee was at the times hereinafter alleged, in said shed at [3] said Berth 59, having been shortly prior thereto discharged by various vessels and was then and there awaiting delivery to plaintiff.

V.

That defendants maintained beneath said shed and said Berth 59 a certain 8-inch cast-iron water pipe, installed on a date in the remote past which is unknown to plaintiff. That defendants knowingly permitted said pipe to remain beneath said shed although defendants knew, or in the exercise of due care should have known, that said pipe was in an ancient, weak, corroded and decayed condition so that said pipe could not reasonably have been expected to contain water under pressure therein. That defendant thereby knowingly and negligently permitted a dangerous condition to exist upon said premises. That defendants were negligent in the foregoing respects and in all the respects set forth in Paragraph VII hereof.

VI.

That on or about the 12th day of March, 1956, by

reason of the negligence of the defendants, as aforesaid, and as set forth hereinafter, a large quantity of water escaped from said pipe under high pressure, which said quantity of water wet the plaintiff's coffee, to the damage of said coffee in the sum of \$30,000.00 as nearly as the same can now be ascertained.

VII.

That said damage was caused by the negligence of defendants, as aforesaid, and in the following respects:

(a). In that the defendants maintained high water pressure in said pipe without ascertaining whether said pipe was of sufficient strength at said time to withstand said pressure.

(b). In that defendants knowingly omitted to maintain said pipe with the result that said pipe was in such condition that it could not maintain the water pressure placed therein by [4] defendants.

(c). In that said pipe was of such an age as, under existing conditions, to render it unsafe for the purpose intended.

(d). In that defendants failed to keep an adequate watch at said shed and to discover said leakage with reasonable speed, so as to move said coffee from said water as soon as possible.

(e). In other further respects which are not presently known to plaintiff.

VIII.

That on the 25th day of April, 1956, plaintiff

Grace & Co. (Pacific Coast) duly and regularly filed its verified claim covering the above-mentioned damages with Walter C. Peters, the City Clerk of the City of Los Angeles. That said verified claim specified the name and address of claimant, the date and place of the action of which complaint is made, and the extent of the damage received.

That the said claim has been rejected by The City of Los Angeles. That nothing has been paid on account of the said claim or any part thereof.

IX.

That all and singular the premises are true and are within the jurisdiction of this Honorable Court.

Wherefore, Plaintiff prays judgment against defendants as follows:

1. That plaintiff have and recover from defendants the sum of \$30,000.00.

2. That plaintiff have and recover interests and [5] costs herein with such other and further relief as may be just, proper and meet in the premises.

McCUTCHEN, BLACK,
HARNAGEL & GREEN,

PHILIP K. VERLEGER,
ANN E. STODDEN,

By /s/ PHILIP K. VERLEGER,
Attorneys for Plaintiff.

[Endorsed]: Filed November 21, 1956. [6]

[Title of District Court and Cause.]

ANSWER OF CITY OF LOS ANGELES, A
MUNICIPAL CORPORATION, TO
AMENDED COMPLAINT

Comes now the defendant City of Los Angeles, a municipal corporation, and answering the Amended Complaint on file herein, for itself alone and not for any of its co-defendants, admits, denies and alleges as follows:

I.

Answering Paragraph I, defendant admits the allegations therein contained, except that defendant denies, generally and specifically, that it is liable, either jointly or otherwise with the defendants therein named, by reason of the evidence therein alleged, or otherwise or at all.

II.

Answering Paragraph II, defendant admits the allegations [7] therein contained.

III.

Answering Paragraph III, defendant City of Los Angeles admits that it is and at all times alleged in said Amended Complaint was the owner of Berth 59, Los Angeles Harbor, together with a certain transit shed located thereat, which shed was used through and by others to hold goods, but other than as herein expressly admitted, denies, generally and specifically, each and every allegation in said paragraph contained.

IV.

Answering Paragraph IV of the Amended Complaint herein, defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations therein contained, and basing its denial upon that ground, denies each and every allegation in said paragraph contained.

V.

Answering Paragraph V of the Amended Complaint herein, defendant City of Los Angeles admits that it maintains beneath said shed and said Berth 59 a certain 8-inch cast-iron water pipe as part of a necessary sprinkler and fire prevention system for the protection of said berth and shed, but, other than as herein expressly admitted, denies, generally and specifically, each and every allegation in said paragraph contained.

VI.

Answering Paragraph VI of the Amended Complaint herein, defendant admits that on or about the 12th day of March, 1956, a quantity of water escaped from said pipe into said shed, which said quantity of water wet certain merchandise lodged therein, but other than as herein expressly admitted, denies, generally and specifically, each and every allegation in said paragraph contained.

VII.

Answering Paragraph VII of the Amended Complaint herein, [8] defendant denies, generally and

specifically, each and every allegation therein contained.

VIII.

Answering Paragraph VIII of the Amended Complaint herein, defendant admits the allegations therein contained.

IX.

Answering Paragraph IX of the Amended Complaint herein, defendant alleges that all and singular the premises in this Answer set forth are true and admits the jurisdiction of this Honorable Court.

For a Second, Separate and Distinct Answer and Defense to the Amended Complaint on file herein, defendant City of Los Angeles admits, denies and alleges as follows:

I.

Repeats the allegations contained in Paragraphs I through IX of the First Answer and Defense herein, and incorporates the same by reference as though said allegations were herein set forth in full.

II.

That at all times herein mentioned, defendant is and was a Municipal Corporation of the State of California, organized and operating under a Freeholders' Charter adopted under the provisions of Section 8, Article XI, Constitution of said State.

III.

That the Board of Harbor Commissioners of the City of Los Angeles is the duly constituted au-

thority having jurisdiction, superintendence and control, under the provisions of said Charter, of the Harbor Department, a branch of the government of said City of Los Angeles, and the lands and transit shed at Los Angeles Harbor located at Berth 59, hereinafter mentioned. [9]

IV.

That pursuant to the authority vested in defendant and said Board of Harbor Commissioners by said Charter, defendant has adopted its Port of Los Angeles Tariff No. 3, enacting rules and regulations at Los Angeles Harbor for Wharf storage, berth assignments and cargo handling, covering shippers, handlers, exporters and importers of cargo transiting its berths and transit sheds, including said Berth 59 and the shed located thereat; that said Tariff was enacted by Order No. 2365 of said Board of Harbor Commissioners, adopted August 30, 1950, as amended, and approved by Ordinance No. 97,629 of the City of Los Angeles, adopted January 24, 1951, as amended, and was in full force and effect on the 12th day of March, 1956, at the time of the loss or damage herein complained of, and was pertinent to and binding upon all parties to this action; that at all times mentioned herein and for a long time prior thereto plaintiff had actual notice of said Tariff, including the provision hereinafter alleged as Item 535(b) thereof.

V.

That said Tariff provides, in Item 535 thereof, as follows:

“(b) Neither the Board nor the City shall be responsible or liable in any manner or degree for any loss or damage to any merchandise or other property of any description stored, handled, used, kept or placed upon, over, in, through, or under any wharf or other structure or property owned, controlled or operated by the Board or the City occasioned by or on account of pilferage, rodents, insects, natural shrinkage, wastage, decay, seepage, leaky containers, heating, evaporation, fire, leakage or discharge from sprinkler system, rain, floods, or the elements, collapse of a wharf or other structure, war, riots, strikes, or from any cause whatsoever, except to the extent that responsibility and liability shall be, regardless of the above limitations, absolutely imposed by [10] operation of law.”

VI.

That plaintiff, Grace & Co. (Pacific Coast), a corporation, was, at the time and place of the loss or damage alleged, a party to and governed by said Item 535(b) of Port of Los Angeles Tariff No. 3, and by reason of the provisions thereof hereinabove set forth defendant City of Los Angeles was and is absolved of and from any and all liability arising out of the alleged loss or damage to said or any goods or merchandise located in said transit shed at said Berth 59 which is alleged to have resulted from water which escaped from said pipe and sprinkler system on or about March 12, 1956.

For a Third, Separate and Distinct Answer and Defense, defendant City of Los Angeles alleges:

I.

Repeats the allegations contained in Paragraphs I through IX of the First Answer and Defense herein, and in Paragraphs I through VI of the Second Answer and Defense herein, and incorporates the same by reference as though said allegations were herein set forth in full.

II.

That on or about November 23, 1946, and extending to and including March 12, 1956, and continuing thereafter, plaintiff's parent company, and/or subsidiary, Grace Line, Inc., was preferential assignee of said Berth 59, including the transit shed located thereon, under an instrument in writing designated as Preferential Berth Assignment No. 105, by the Harbor Department, City of Los Angeles, accepted by said Grace Line, Inc., executed by F. L. Doelker, Vice President of said Company, dated January 3, 1946, by which acceptance said grantee agreed to be bound by and to observe each and every of the terms thereof; that by the provisions of said [11] Berth Assignment said Grace Line, Inc., agreed, in Paragraph 4 thereof:

"That this assignment and privileges hereby granted shall at all times be subject to the charter of the City of Los Angeles and to the orders, rules and regulations of the Board of Harbor Commis-

sioners and the ordinances of said city adopted in pursuance of said charter.”

III.

That said Grace Line, Inc., at the time and place of the loss or damage herein complained of, was the alter ego and/or agent of the plaintiff herein, and that by reason of the provisions and agreements contained in said Preferential Berth Assignment No. 105, effective November 23, 1946, and extending to and including March 12, 1956, and continuing thereafter, plaintiff was and is bound by each and every of the terms and provisions of said Preferential Berth Assignment No. 105 and of the provisions of Port of Los Angeles Tariff No. 3 and Item 535(b) thereof.

For a Fourth, Separate and Distinct Answer and Defense, defendant City of Los Angeles alleges:

I.

Repeats the allegations contained in Paragraphs I through IX of the First Answer and Defense herein, and incorporates the same by reference as though said allegations were herein set forth in full.

II.

That plaintiff did not exercise ordinary care, caution or prudence in the premises to avoid said occurrence or for the safety of its said goods and merchandise, in that plaintiff failed and neglected to maintain an adequate or any watch at the time and place alleged or at all, for the purpose of pro-

tecting said goods and merchandise or warning defendant of any such sprinkler leakage [12] or quantity of water entering said shed, and thereby affording defendant an opportunity to remedy said condition and/or minimize the damages to plaintiff's goods arising therefrom.

For a Fifth, Separate and Distinct Defense and Answer, defendant City of Los Angeles alleges:

I.

Repeats the allegations contained in Paragraphs I through IX of the First Answer and Defense herein, and incorporates the same by reference as though said allegations were herein set forth in full.

II.

That the alleged occurrence mentioned in plaintiff's Amended Complaint was the result of an inevitable and unavoidable accident insofar as this answering defendant is concerned.

For a Sixth, Separate and Distinct Defense and Answer, defendant City of Los Angeles alleges:

I.

Repeats the allegations contained in Paragraphs I through IX of the First Answer and Defense herein, and incorporates the same by reference as though said allegations were herein set forth in full.

II.

That the water pipe located beneath said shed, as alleged, was maintained by defendant in its govern-

mental capacity as a part of its fire prevention system, and defendant denies that said or any defective or dangerous condition was present prior to March 12, 1956, or was known to any officers or employees of defendant who possessed or had authority to remedy the same, or otherwise. Denies that any of said officers or employees of defendant had a reasonable or any time after notice thereof or otherwise to remedy [13] said condition, and denies that said or any of such officers or employees, after acquiring such knowledge and notice, failed and neglected to remedy said condition, and/or failed and neglected to take action reasonable or necessary to protect said goods against any such water damage; and denies, generally and specifically, any knowledge or notice of any such dangerous or defective condition that may have existed on or about said premises prior to the alleged loss or damage.

For a Seventh, Separate and Distinct Answer and Defense, defendant City of Los Angeles alleges:

I.

Repeats the allegations contained in Paragraphs I through IX of the First Answer and Defense herein, and incorporates the same by reference as though said allegations were herein set forth in full.

II.

That the cause of action alleged in the Amended Complaint herein is barred by the provisions of Section 53051 of the Government Code of the State

of California, in that the defendant City of Los Angeles is a local agency and the alleged dangerous and defective condition is alleged to have existed on public property; that said defendant is not liable for injuries to property resulting from a dangerous or defective condition of public property under the circumstances alleged for the following reasons:

(a) Said defendant had no prior knowledge or notice of the defective or dangerous condition alleged;

(b) Said defendant had no opportunity, for a reasonable time or otherwise, after acquiring said knowledge or receiving said notice, to remedy said alleged condition or take action reasonably necessary to protect plaintiff against said condition. [14]

Wherefore, defendant prays that plaintiff take nothing by its Amended Complaint herein, and that defendant City of Los Angeles be dismissed hence with its cost herein incurred, and for such other and further relief as this Court may deem meet and just.

ROGER ARNEBERGH,
City Attorney;

ARTHUR W. NORDSTROM,
Assistant;

C. N. PERKINS,
Deputy.

By /s/ C. N. PERKINS,
Attorneys for Defendant,
City of Los Angeles.

TRIPPET, YOAKUM,
STEARNS & BALLANTYNE,

By /s/ F. B. YOAKUM, JR.,
Of Council for Defendant,
City of Los Angeles.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed December 6, 1956. [15]

[Title of District Court and Cause.]

Civil No. 20624-HW

ANSWERS TO INTERROGATORIES PRO-
POUNDED TO DEFENDANT CITY OF
LOS ANGELES BY PLAINTIFF

State of California,
County of Los Angeles—ss.

E. V. Dockweiler, having been duly sworn, deposes and says: That he is Harbor Engineer of The City of Los Angeles, a municipal corporation, one of the defendants herein; that from information obtained from personal knowledge and investigation, reports of subordinate employees acting under his supervision, and records and files in his custody kept in the regular course of business, he makes the following Answers to Interrogatories propounded to said defendant by the plaintiff in the above-entitled case: [17]

Interrogatory No. I.

“(a). State whether or not the City of Los Angeles owned Berth 59, Pier 1, Los Angeles Harbor, together with the buildings situate at said Berth 59, on or about March 12, 1956.

“(b). State whether or not the City of Los Angeles maintained and kept in repair the facility of said Berth 59, including any and all water piping beneath said Berth 59, on or about March 12, 1956.

“(c). If any person other than the City of Los Angeles maintained said berth, including said water piping, on or about March 12, 1956, state who said person was, what the work done by said person was, and whether or not said work was done under contract with the City of Los Angeles.”

Answer to Interrogatory No. I.

(a). Yes, the City of Los Angeles owned Berth 59, Pier 1, at Los Angeles Harbor, together with the buildings situate at said Berth 59, on or about March 12, 1956.

(b). Yes, the City of Los Angeles maintained and kept in repair the facility of said Berth 59, including any and all water piping beneath said Berth 59, on or about March 12, 1956, at such times and in such places as it became aware that such maintenance work was necessary in order to keep said water piping in good operating condition; such maintenance does not include digging up paving in order to inspect underground piping beneath buildings in order to determine the condition of

water piping located thereat unless water is found above ground, indicating evidence of a possible leak in the piping installed below ground.

(c). No person, firm or corporation other than the City of Los Angeles maintained said berth, including said water piping, on or about March 12, 1956. [18]

Interrogatory No. II.

“(a). State whether or not the warehouse or shed upon said Berth 59, including the foundation and the substructure of the same, was erected by the City of Los Angeles.

“(b). If the said structure was erected by any other person under contract to the City of Los Angeles, state who said person is.

“(c). State whether or not the City of Los Angeles has in its possession the plans or blueprints of said Berth 59, including:

“1. Plans of the foundation and substructure of said Berth 59, including specifications as to fill, if any; and

“2. Plans of any and all piping beneath said Berth 59.”

Answer to Interrogatory No. II.

(a). The transit shed located at said Berth 59, including the foundation and the substructure of the same, was erected by the Harbor Department of the City of Los Angeles.

(b). The transit shed at Berth 59, including the foundation and substructure of the same, was erected by the City of Los Angeles; certain parts of the construction work were performed by subcontractors, such as the paving on the wharf by Griffith and Company; the material for the exterior walls of the transit shed by Johns-Manville Company; the wharf and shed footings, including the bulkhead, anchors, riprap, and foundation were erected by Snare and Tviest, contractors; steel work was erected by Llewellyn Iron Works, contractors. No records are available indicating the identity of the contractors who made the earth fill or who poured the concrete floor slab. The original flooring in the transit shed was of timber construction which was replaced with a concrete floor slab poured in black iron mesh, laid on top of a compacted earth fill. [19]

(c). 1. Plans of the foundation and substructure of said Berth 59, numbered 1263 and 1170-B, are available and blueprints of the same will be supplied upon request.

2. Plans of piping beneath the transit shed at Berth 59, including plans of the sprinkler system supplying said shed, numbered 6211 and 1340, are available and will be supplied upon request.

Interrogatory No. III.

“(a). State when said Berth 59 was originally constructed.

“(b). State whether or not any alterations have since been made in said Berth 59, including altera-

tions as to the foundation and the piping beneath said Berth 59.

“(c). State whether the City of Los Angeles has plans and blueprints for any and all such changes.”

Answer to Interrogatory No. III.

(a). Berth 59 was originally constructed during or about the year 1914.

(b). No alterations have been made in said Berth 59 to the foundation or the piping beneath said berth since the transit shed located thereon was first constructed, except as noted in II (b).

(c). No plans or blueprints of any changes are in the possession of the City of Los Angeles, nor are any plans available for the concrete slab floor.

Interrogatory No. IV.

“(a). (1). State whether or not the floor of the warehouse of said Berth 59 consists of concrete without reinforcing, and approximately 6 inches thick.

“(2). If the floor is otherwise constructed, describe said construction.

“(3). State for what loading, including ‘live’ and ‘dead’ loads, the floor was designed. [20]

“(b). State whether or not said floor slab is supported by a compacted dirt fill contained be-

tween a retaining wall on the water side of said berth and a retaining wall on the landward side.

“(c). State from where the dirt which was used for any fill beneath the floor of said Berth 59 was obtained.”

Answer to Interrogatory No. IV.

(a). (1). The floor of the transit shed at said Berth 59 consists of concrete reinforced with standard black iron mesh, and said floor is approximately six inches thick.

(2). The floor was not otherwise constructed as of March 12, 1956, except for minor repairs made with bitumastic concrete.

(3). The floor was designed for 400 pounds per square foot loading, including both “live” and “dead” loads.

(b). Said floor slab is supported by a compacted dirt fill to a depth of four to five feet contained between a concrete sheet pile bulkhead wall on the water side of said berth and a standard concrete retaining wall on the land side.

(c). The original source of this dirt fill is unknown and is not designated in Harbor Department records.

Interrogatory No. V.

“(a). (1). State whether or not on or about March 12, 1956, a quantity of water escaped from a water pipe beneath said Berth 59.

“(b). State whether or not said water reached the surface of the floor, and damaged commodities then in the shed at said Berth 59.

“(c). State fully how, so far as the City knows, said water escaped from said pipe.

“(d). State fully in what manner the water from said pipe reached the surface of said floor. [21]

“(e). State whether or not a portion of the floor of said shed collapsed following the escape of said water.

“(f). State in what manner the escape of said water brought about the failure of said floor.

“(g). State the degree, if any, to which said pipe was corroded at the time of failure.

“(h). State the material of which said pipe was made, the method of manufacture, the thickness of its wall at the time of manufacture, the place of manufacture, and the date of installation.

“(i). State the depth of the top of the said pipe below the top of the floor of said berth.”

Answer to Interrogatory No. V.

(a). Yes, water was reported to Harbor Department representatives leaking beneath the platform on the land side of the shed, at or about 6:00 a.m. March 12, 1956, and the water pipe beneath the transit shed was shut off at or about 6:45 a.m.

(b). Yes, at the time Harbor Department maintenance men arrived at the shed water had reached

the surface of the floor and had wet commodities then in the shed at said Berth 59.

(c). The pipe beneath the loading platform on the land side under paving and approximately eight or nine feet below the level of the transit shed floor and outside the shed burst and water escaped therefrom.

(d). The water was forced up through the dirt fill under the loading dock floor and apparently through an opening between the loading dock floor and the transit shed foundation inside the building, some of the water flowing out over the top of the loading dock into the street and some of the water flowing down into the center of the transit shed floor.

(e). Yes, an area approximately 20 by 40 feet of the shed floor collapsed. [22]

(f). The water undermined the dirt fill, and after the water had been shut off and some time had elapsed, the surface of the floor collapsed and dropped approximately four to six feet, apparently due to the weight of cargo and traffic over it.

(g). The hole through which water escaped from the pipe covered an area about as big as an average man's hand.

(h). Said pipe was standard cast iron bell and spigot, eight-inch water pipe, thickness of wall approximately 9/16", place of manufacture unknown, installed about the year 1914.

(i). The pipe was installed approximately seven to eight feet below the surface of the floor of said berth.

Interrogatory No. VI.

“(a). State whether or not any report was made to the City with respect to the said failure.

“(b). If any such report was made, describe the same fully, giving the name of the person making the report, the name of the person to whom it was made, and the date of the report, and state whether these reports were in writing.”

Answer to Interrogatory No. VI.

(a). Report was made to Harbor Department plumber foreman by telephone from Harbor Department Supply Yard watchman.

(b). The name of the watchman making the report was Marvin F. Williams. The name of the person to whom the report was made was C. V. H. Brashier, plumber foreman, and the date of the report was March 12, 1956. These reports were made by telephone.

Interrogatory No. VII.

“(a). Describe the manner in which the pipe was repaired, or replaced, after the failure of the pipe referred to in plaintiff's complaint.

“(b). Give the names of each and every person participating in the removal of the section of pipe

from which the water [23] escaped and the repair or replacement thereof."

Answer to Interrogatory No. VII.

(a). A necessary length of pipe was cut off and replaced with new cast iron pipe after the occurrence of March 12, 1956, referred to in plaintiff's Complaint.

(b). The names of each and every person participating in the removal of the section of pipe from which the water escaped and the repair and replacement thereof are as follow. T. Bilich, C. Cope, V. Cosgro, B. David, H. Freese, G. Haworth, W. Horton, F. Huerta, C. Mellor, J. Moreno, E. Parsons, D. Pence, R. Sinden, E. Stephens, H. Thomas, J. Ward, L. Samson, C. Brashier, H. J. Smith, J. Hanna, F. Pietrzak and R. Witt.

Interrogatory No. VIII.

"(a). Describe fully any method, plan, or system of maintenance, inspection, and repair which the City had in effect as respects said pipe, prior to the escape of said water from said pipe. Give names of all persons inspecting.

"(b). If any reports were made incident to said inspection, give the dates of said reports, and the persons to whom said reports were made."

Answer to Interrogatory No. VIII.

(a). No inspection of the underground piping was made until some trouble was reported or some

evidence of leakage developed, in view of the fact that this particular pipe was installed some eight feet below the surface of a concrete slab floor in use and it was impractical to break through the same.

(b). There was no underground inspection made of the piping in this transit shed, and no reports were made except where evidence of leakage occurred.

Interrogatory No. IX.

“(a). State the uses to which the water in said pipe are put. [24]

“(b). State the static head of water in said pipe in feet or in pounds per square inch when there was no flow of water in said pipe.

“(c). State the maximum internal pressure to which said pipe might at any time have been subjected, including pressure of water hammer.

“(d). State whether or not the water from said pipe was being drawn at any point within the 24 hours prior to failure of said pipe.

“(e). State whether or not the flow of water in said pipe was shut off at any time in the 24 hours of said failure, giving the time and occasion of said shutoff.

“(f). State the maximum rate of flow of water in said pipe at any time in gallons or cubic feet per minute.”

Answer to Interrogatory No. IX.

(a). Fire prevention only. This pipe provided water to the sprinkler system in the transit shed only.

(b). The static head of water in said pipe was the normal Los Angeles Water Department pressure in said area, which was approximately 65 pounds per square inch.

(c). The maximum internal pressure to which said pipe would be subjected at any time would be the normal Los Angeles Water Department pressure; the shutoff valves in the system were slow moving, hand operated valves, and the air entrained in the system would have prevented any water hammer effect from occurring.

(d). No water was drawn at any point from said system within 24 hours prior to the occurrence of March 12, 1956, as far as is known.

(e). The flow of water in said pipe was not shut off at any time within 24 hours prior to the occurrence of March 12, 1956, as far as is known, with the exception of the shutoff which [25] occurred at or about 6:45 a.m. March 12, 1956, after the leakage complained of.

(f). Under a pressure of 65 pounds per square inch, the rate of flow is approximately 20,000 gallons per minute.

Interrogatory No. X.

“(a). State what, if any, methods were used

to ascertain at any time whether or not there was leakage from said pipe."

Answer to Interrogatory No. X.

(a). None, previous to the break. An inspection would only be made where surface water was apparent.

Interrogatory No. XI.

"(a). State what disposition was made of the section of pipe referred to following removal of such damaged section, if any, from said shed.

"(b). State whether said damaged section of pipe was marked in any way.

"(c). State where said damaged section of pipe is being kept at the present time.

"(d). State in whose charge said damaged section of pipe was placed and in whose custody it now is."

Answer to Interrogatory No. XI.

(a). The pipe referred to was removed to the Harbor Department Supply Yard, Berth 161, where photographs were taken, and the pipe is now retained for further reference at the same location. Prints of the photographs are available upon request.

(b). The section of the damaged pipe was marked with crayon at the time it was cut out, for reference only.

(c). At the Los Angeles Harbor Department Supply Yard, Berth 161, Wilmington.

(d). The damaged section of pipe is in the custody of C. V. H. Brashier, plumber foreman. [26]

Interrogatory No. XII.

“(a). State whether or not the City has at any time made any alterations of the soil in which said pipe was placed, as respects the corrosivity of said soil and for what purpose.

“(b). If such an alteration was made, state by whom it was made and the date, and what was its effect.”

Answer to Interrogatory No. XII.

(a). There have been no alterations of the soil in which the pipe was placed, as far as is known.

(b). No alteration was made.

Interrogatory No. XIII.

“(a). State whether or not the pipe in question was made of cast iron.

“(b). If the answer to (a) is ‘Yes,’ state whether or not the City has experienced failure of cast iron pipes by reason of corrosion in any past occasions.”

Answer to Interrogatory No. XIII.

(a). The pipe was made of ordinary cast iron.

(b). The Harbor Department has experienced, infrequently, some failure of cast iron pipes, as well as steel pipes, and wherever such failure has been experienced replacement has been made as the condition was discovered.

Interrogatory No. XIV.

“(a). State the number of occasions on which the City has experienced failure of cast iron pipes due to corrosion:

1. Within 5 years or less after installation of such pipes,
2. Within 5 to 10 years after installation of such pipes, and
3. Within 10 to 20 years after installation of such pipes.

“(b). Give the date and place of each instance of a failure of [27] cast iron pipe in the City of Los Angeles within the past 10 years, giving in each instance the cause of said failure, and the date and place thereof, the date of the installation of the pipe, the soil corrosivity or resistivity, the type of soil, the diameter class and method of manufacture of the pipe.”

Answer to Interrogatory No. XIV.

(a). The number of occasions on which the City of Los Angeles Harbor Department has experienced failure of cast iron water pipes due to corrosion,

prior to March 12, 1956, and within the times hereinafter mentioned, are as follows:

1. Within five years or less after installation of such pipes—none, so far as is known.
2. Within five to ten years after installation of such pipes—none, so far as is known.
3. Within ten to twenty years after installation of such pipes—two specific instances, one approximately fourteen years and the other approximately fifteen years after installation, so far as is known.

There is a great deal of cast iron water pipe installed in the ground serving Harbor Department properties which has been in service continuously since 1914 or thereabouts, without any apparent failure.

(b). The only instances of failure of cast iron water pipe installed by the Harbor Department and serving its properties within the past ten years prior to the occurrence of March 12, 1956, so far as is known, are as follows:

On February 15, 1954, a section of five-inch cast iron bell and spigot water pipe was replaced, due to corrosion, at Berth 60. On October 11, 1955, a section of eight-inch cast iron bell and spigot water pipe was repaired, due to corrosion, at Berth 59. [28]

There is no record of the method of manufacture of these pipes, nor was any test made to determine the corrosivity or resistivity, or the type of soil, so far as is known.

Interrogatory No. XV.

“(a). State whether the City made any effort to ascertain the reasonable life to be anticipated of the pipe beneath Berth 59.

“(b). If the answer to (a) is ‘Yes,’ state by whom said effort was made, what the estimated life calculated was, whether any written records exists of said estimate, and when said estimate was made, and what the estimate was.”

Answer to Interrogatory No. XV.

(a). No effort to ascertain the reasonable life of the pipe installed beneath Berth 59 was made, nor is any effort made to ascertain the reasonable life of any other cast iron pipe installed in the ground on Harbor Department lands, because it is impractical to dig up such pipe for inspection.

(b). No estimate is made of the life of such pipe, and no written records exist on the subject as far as is known.

Interrogatory No. XVI.

“(a). Does the City have any maps of the City of Los Angeles or any parts thereof indicating the corrosivity of soils with respect to the various areas in the City?

“(b). If the answer to (a) is ‘Yes,’ state in whose custody said maps or reports thereof are.

“Attach copy of maps to answers to interrogatories.

“(c). Does the City have records of underground cast iron pipe failures which show size and class of pipe, location, dates of installation and of failure, type of soil and soil resistivity or corrosivity, or any of the above?

“(d). If the answer to (c) is ‘Yes,’ state in whose custody said records are kept.” [29]

Answer to Interrogatory No. XVI.

(a). No maps of the Harbor Department properties of the City of Los Angeles indicate the corrosivity of the soil, so far as is known.

(b). No person has custody of any such maps, nor are any copies of same available, so far as is known.

(c). No records of underground cast iron pipe failure, showing the size and class of pipe, location, dates of failure, type of soil, and soil resistivity or corrosivity are kept by the Harbor Department.

(d). No one has custody of such records.

Interrogatory No. XVII.

“(a). State whether or not the City has in its employ engineers who are experts with respect to corrosion of piping.

(b). If the City has such experts in its employ, state whether or not their services were used in any way in determining the reasonable life of the piping in question.”

Answer to Interrogatory No. XVII.

(a). The Harbor Department has a testing engineer, C. M. Wakeman, who tests materials for strength and other qualities, which are used in Harbor Department construction projects.

(b). No records are available indicating that the services of a testing engineer were used in any way in determining the reasonable life of the cast iron pipe in question laid underground at Berth 59 at or about the year 1914.

/s/ E. V. DOCKWEILER.

Subscribed and sworn to before me this 14th day of January, 1957.

[Seal] /s/ LILLIAN B. KINZY,
Notary Public in and for the County of Los Angeles,
State of California.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney;

ARTHUR W. NORDSTROM,
Assistant;

C. N. PERKINS,
Deputy;

By /s/ C. N. PERKINS,
Attorneys for Defendant
City of Los Angeles.

TRIPPET, YOAKUM,
STEARNS & BALLANTYNE.

By /s/ F. B. YOAKUM, JR.,
Of Counsel for Defendant
City of Los Angeles.

Receipt of copy acknowledged.

[Endorsed]: Filed January 15, 1957. [30]

[Title of District Court and Cause.]

ADDITIONAL ANSWERS TO INTERROGA-
TORIES NUMBERED VIII, XIII, XIV,
XVI AND XVII, SUBMITTED BY DE-
FENDANT CITY OF LOS ANGELES AS
REQUIRED BY COURT ORDER MADE
FEBRUARY 25, 1957

I.

State of California,
County of Los Angeles—ss.

E. V. Dockweiler, having been duly sworn, de-
poses and says: That he is Chief Harbor Engineer
of the City of Los Angeles, a municipal corpora-
tion, one of the defendants herein; that from infor-
mation obtained from personal knowledge and in-
vestigation, reports of subordinate employees act-
ing under his supervision, and records and files in
his custody and kept in the regular course of busi-
ness, he makes the following additional answer to
Interrogatory No. VIII, in conformity with the

first requirement of Court Order made February 25, 1957, which recites: [32]

“First: Respecting plaintiff’s Interrogatory No. 8, the defendant The City of Los Angeles is required to give the dates of any reports made where evidence of a leakage occurred as to piping in the transit shed referred to in the defendant’s answer to plaintiff’s said Interrogatory No. 8, and to give the name of the person to whom said report was made.”

Answer to First Requirement.

The dates of any reports made where evidence of a leakage in the transit shed referred to in defendant’s Answer to Plaintiff’s Interrogatory No. VIII, and the name of the person to whom said report was made, are as follows: No leakage due to corrosion or otherwise was ever reported prior to the escape of said water from said pipe, in said pipe or in other piping inside the transit shed referred to at Berth 59. The date and the names of the persons making and receiving the report on the leakage which occurred March 12, 1956, are given in the Answer to Interrogatory No. VI.

Upon further investigation and study of Harbor Department records, affiant finds himself to have been in error with respect to incidents of prior leakage given in his Answer to Interrogatory No. XIV (b) heretofore made as follows: “On February 15, 1954, a section of five-inch cast iron bell and spigot water pipe was replaced, due to corrosion, at Berth

60. On October 11, 1955, a section of eight-inch cast iron bell and spigot water pipe was repaired, due to corrosion, at Berth 59."

Affiant now corrects said answer quoted above to read as follows: On February 15, 1954, a section of five-inch cast iron bell and spigot water pipe inside the transit shed at Berth 60, which shed is separated by a concrete fire wall and driveway from the transit shed at Berth 59, was repaired due to a straight sheer from an unknown cause. This break was not due to corrosion. The transit shed at Berth 60 was empty at the time and no cargo damage [33] occurred. No record of a report of leakage has been found in Harbor Department files. The broken pipe was repaired with a split sleeve at a time when a bulkhead within the said transit shed was undergoing repair. On October 11, 1955, at 4:15 p.m., Harbor Department plumber Dale Pence was notified by telephone by Margaret Reynolds, secretary in the Operating Division, of a water leak at Berth 59 in the street outside the transit shed opposite Door 25. On October 13, 1955, the leak, due to a broken leaded joint, was repaired. This leak was not caused by corrosion. No water damage occurred in the transit shed at Berth 59 at said time.

E. V. DOCKWEILER.

Subscribed and sworn to before me this 21st day of June, 1957.

[Seal] /s/ LILLIAN B. KINZY,
Notary Public in and for the County of Los Angeles, State of California.

II.

State of California,
County of Los Angeles—ss.

Robert R. Ashline, having been duly sworn, deposes and says: That he is Corrosion Engineer of the Water System of the Department of Water and Power of the City of Los Angeles, a municipal corporation, one of the defendants herein; that from information obtained from personal knowledge and investigation, reports of subordinate employees and office associates acting under his supervision, and records and files in his custody kept in the regular course of business, he makes the following additional answers to Interrogatories Nos. XIII, XIV, XVI, and XVII, in conformity with the second requirement of the Court Order made February 25, 1957, which recites: [34]

“Second: Defendant is required to answer plaintiff’s Interrogatories numbered 13, 14, 16 and 17, and to answer said interrogatories with respect to The City of Los Angeles in all its departments, rather than confining said answers to the Harbor Department. The answers of The City of Los Angeles to such of said interrogatories as refer to the experiences of the City respecting pipe may be confined to the experience of The City of Los Angeles within one (1) mile of the waterfront of Los Angeles Harbor.”

Interrogatory No. XIII.

“(b) * * * state whether or not the City has experienced failure of cast iron pipes by reason of corrosion in any past occasions.”

Answer.

The Water System of the Department of Water and Power, the only other agency of the City of Los Angeles having jurisdiction and control over underground pipe installations in the area within one mile inland of the pierhead lines established by the Federal Government at Los Angeles Harbor, has experienced failures of cast iron pipes due to corrosion as follows:

Schedule A

Main	St.	Main Size	Location	Within 1-5 Years After Installation	Main Install.	Date of Fail.	Type of Break	Corrosive Index
				None				
				Within 6-10 Years After Installation				
10th	St.	6" C.I.	30' WW Mesa St.	1931	1939		Corrosion	None
22nd	St.	8" C.I.	62' W Outer St.	1934	1940		Corrosion	Severe
22nd	St.	8" C.I.	26' W Outer St.	1934	1941		Corrosion	Severe
22nd	St.	8" C.I.	43' W Outer St.	1934	1941		Corrosion	Severe
22nd	St.	8" C.I.	255' W Outer St.	1934	1941		Corrosion	Severe
22nd	St.	8" C.I.	266' W Outer St.	1934	1941		Corrosion	Severe
22nd	St.	8" C.I.	158' W Outer St.	1934	1942		Corrosion	Severe
Bluff	Pl.	4" C.I.	35' No 38th St.	1932	1940		Corrosion	Severe
Ocean	Ave.	8" C.I.	Int. of Herne Pl.	1930	1940		Corrosion	Mild
				Within 11-20 Years After Installation				
13th	St.	6" C.I.	165' EE Cabrillo Ave.	1925	1945		Corrosion	Severe
36th	St.	6" C.I.	13' WW Peck Ave.	1923	1942		Corrosion	Severe
36th	St.	6" C.I.	100' W Peck Ave.	1923	1943		Corrosion	Severe
37th	St.	4" C.I.	340' W Pacific Ave.	1922	1941		Corrosion	Severe
Alameda	St.	6" C.I.	38' S/o Grant St.	1925	1941		Corrosion	None
Alma	St.	6" C.I.	45' N/o 27th St.	1924	1939		Corrosion	Severe
Anaheim	St.	6" C.I.	17' EW Foote Ave.	1928	1947		Corrosion	None
Anaheim	St.	20" C.I.	65' W/o Neptune Ave.	1929	1940		Corrosion	Mild
Anaheim	St.	8" C.I.	652' E/o Sigsbee Ave.	1928	1946		Corrosion	None
Bandini	St.	6" C.I.	17' S/o Upland Ave.	1925	1940		Corrosion	None
Beacon	St.	6" C.I.	135' SS 16th St.	1924	1941		Corrosion	Severe
Beacon	St.	6" C.I.	60' SS 16th St.	1924	1941		Corrosion	Severe
Beacon	St.	6" C.I.	38' SS 16th St.	1924	1944		Corrosion	Severe
Beacon	St.	6" C.I.	39' S/o 15th St.	1924	1942		Corrosion	Severe
Beacon	St.	6" C.I.	35' S/o 14th St.	1924	1943		Corrosion	Severe
Beacon	St.	6" C.I.	97' N/o Crescent Ave.	1924	1939		Corrosion	Severe
Beacon	St.	6" C.I.	17' N/o Crescent Ave.	1924	1942		Corrosion	Severe
Bluff	Pl.	4" C.I.	66' N/o 38th St.	1932	1943		Corrosion	Severe
Cabrillo	St.	4" C.I.	167' NN 37th St.	1925	1942		Corrosion	Severe
Cabrillo	St.	6" C.I.	6' NS 15th St.	1924	1943		Corrosion	Severe
Emily	St.	4" C.I.	294' SS 36th St.	1926	1946		Corrosion	Severe
Frigate	Ave.	6" C.I.	17' N/o Grant St.	1925	1944		Corrosion	Severe
Gaffey	St.	8" C.I.	6' N/o 30th St.	1927	1940		Corrosion	Severe
Gulf	Ave.	6" C.I.	200' SS "C" St.	1927	1940		Corrosion	None
Marine	Ave.	6" C.I.	195' NN "A" St.	1925	1938		Corrosion	None
Marine	Ave.	6" C.I.	75' NN "A" St.	1925	1939		Corrosion	None
Peck	Ave.	6" C.I.	12' N/o 33rd St.	1927	1938		Corrosion	Severe
Summerland	Ave.	6" C.I.	119' E/o Leland St.	1925	1944		Corrosion	Severe
5th	St.	6" C.I.	500' W/o Gaffey St.	1937	1947		Corrosion	Severe

Interrogatory No. XIV.

“(a). State the number of occasions on which the City has experienced failure of cast iron pipes due to corrosion:

1. Within 5 years or less after installation of such pipes,

2. Within 5 to 10 years after installation of such pipes, and

3. Within 10 to 20 years after installation of such pipes.

“(b). Give the date and place of each instance of a failure of cast iron pipe in the City of Los Angeles within the past 10 years, giving in each instance the cause of said failure, and the date and place thereof, the date of the installation of the pipe, the soil corrosivity or resistivity, the type of soil, the diameter class and method of manufacture of the pipe.”

Answer.

(a). The number of occasions on which the Water System of the City of Los Angeles, Department of Water and Power, has experienced failure of cast iron pipe due to corrosion prior to March 12, 1956, and within the times and the one-mile area mentioned above, are as follows: (See Schedule A included as part of Answer to Interrogatory XIII (b), *supra*.)

1. Within five years or less after installation of such pipes: None, as far as is known.

2. Within six to ten years, inclusive, after the installation of such pipes: Nine breaks, as far as is known. [37]

3. Within 11 to 20 years, inclusive, after the installation of such pipes: 29 breaks, as far as is known.

(b). The date and place of each instance of a failure of cast iron water pipe installed by the Water and Power Department within the one-mile area mentioned above and within the years 1946 to and including 1956 (10 years prior to the occurrence of March 12, 1956), as far as is known, are as follows: [38]

Schedule B

Main	St.	Main Size	Location	Main Install.	Date of Fail	Type of Break	Corrosive Index
7th	St.	6" C.I.	40' W/o Gaffey St.	1913	1947	Corrosion	Severe
7th	St.	6" C.I.	36' W/o Gaffey St.	1913	1947	Split or Rupture	Severe
1st	St.	20" C.I.	78' WW Parker St.	1918	1955	Round Crack	Severe
7th	St.	6" C.I.	79' WW Gaffey St.	1913	1950	Rust Hole	Severe
8th	St.	4" C.I.	65' WW Cabrillo Ave.	1925	1949	Round Crack	Severe
8th	St.	4" C.I.	138' WW Cabrillo Ave.	1925	1951	Round Crack	Severe
10th	St.	6" C.I.	60' EE Pacific Ave.	1931	1949	Round Crack	Severe
11th	St.	6" C.I.	206' EE Cabrillo Ave.	1913	1954	Split	Severe
13th	St.	6" C.I.	22' EE Cabrillo Ave.	1925	1946	Split	Severe
13th	St.	6" C.I.	10' WE Cabrillo Ave.	1925	1949	Split	Severe
13th	St.	6" C.I.	33' WW Mesa St.	1925	1949	Split	Severe
14th	St.	6" C.I.	124' WW Cabrillo Ave.	1924	1947	Split	Severe
14th	St.	10" C.I.	44' EE Beacon St.	1914	1953	Ruptured	Severe
15th	St.	6" C.I.	24' W Centre St.	1924	1947	Round Crack	Severe
15th	St.	6" C.I.	230' EE Centre St.	1924	1953	Round Crack	Severe
15th	St.	6" C.I.	112' EE Mesa St.	1924	1952	Round Crack	Severe
16th	St.	6" C.I.	14' WW Beacon St.	1924	1953	Split	Severe
19th	St.	6" C.I.	62' EE Pacific Ave.	1923	1954	Ruptured	Severe
20th	St.	4" C.I.	26' EE Meyler St.	1926	1949	Round Crack	Severe
20th	St.	4" C.I.	315' WW Cabrillo Ave.	1926	1953	Round Crack	Severe
20th	St.	6" C.I.	40' EE Gaffey St.	1923	1950	Split	Severe
22nd	St.	6" C.I.	87' WW Meyler St.	1928	1950	Split	Severe
22nd	St.	6" C.I.	150' W Cabrillo Ave.	1928	1946	Round Crack	Severe
22nd	St.	6" C.I.	11' WE Alma St.	1928	1950	Round Crack	Severe
22nd	St.	6" C.I.	30' WE Alma St.	1928	1953	Round Crack	Severe
23rd	St.	6" C.I.	172' WW Cabrillo Ave.	1928	1949	Round Crack	Severe
26th	St.	6" C.I.	35' WW Alma St.	1924	1950	Round Crack	Severe
26th	St.	6" C.I.	167' WW Alma St.	1928	1947	Round Crack	Severe
26th	St.	4" C.I.	110' EE Gaffey St.	1927	1950	Corrosion	None
27th	St.	4" C.I.	66' EE Cabrillo St.	1927	1949	Round Crack	None
27th	St.	4" C.I.	135' EE Gaffey St.	1927	1955	Round Crack	None
27th	St.	6" C.I.	253' W Alma St.	1923	1946	Corrosion	Severe
27th	St.	4" C.I.	170' EN 28th St.	1924	1955	Round Crack	None
28th	St.	6" C.I.	72' WW Cabrillo Ave.	1928	1952	Ruptured	None
30th	St.	4" C.I.	20' EW Kerchoff Ave.	1916	1954	Split	Severe
30th	St.	4" C.I.	22' E Carolina St.	1915	1947	Corrosion	Severe
32nd	St.	4" C.I.	3' EW Kerchoff Ave.	1915	1949	Round Crack	Severe
32nd	St.	6" C.I.	27' EE Carolina St.	1915	1950	Eleet.	Severe
32nd	St.	6" C.I.	96' EE Gaffey St.	1927	1948	Split	Severe
37th	St.	6" C.I.	94' EE Gaffey St.	1927	1949	Split	Severe
37th	St.	4" C.I.	64' WW Pacific Ave.	1941	1953	Round Crack	Severe
37th	St.	4" C.I.	151' WW Carolina St.	1925	1951	Split	Severe
37th	St.	4" C.I.	75' WW Carolina St.	1925	1951	Split	Severe
38th	St.	4" C.I.	62' W Bluff Pl.	1916	1948	Round Crack	Severe
38th	St.	4" C.I.	50' WW Bluff Pl.	1916	1948	Ruptured	Severe
39th	St.	4" C.I.	50' EE Pacific Ave.	1921	1950	Corrosion	Severe
39th	St.	4" C.I.	160' EE Pacific Ave.	1921	1953	Ruptured	Severe
15th	St.	4" C.I.	98' W Carolina St.	1923	1946	Corrosion	Severe
38th	St.	6" C.I.	30' WW Palos Verdes St.	1924	1951	Rupture	Severe
38th	St.	4" C.I.	200' WW Carolina St.	1923	1950	Round Crack	Severe

Main	St.	Main Size	Location	Main Install.	Date of Fail.	Type of Break	Corrosive Index
39th	St.	4" C.I.	298' WW Carolina St.	1923	1949	Split	Severe
39th	St.	4" C.I.	150' WW Carolina St.	1923	1949	Split	Severe
39th	St.	4" C.I.	140' WW Carolina St.	1923	1949	Rupture	Severe
38th	St.	4" C.I.	100' WW Carolina St.	1922	1949	Rupture	Severe
6th	St.	C.I.	20' EW Palos Verdes St.	1932	1949	Joint	None
5th	St.	6" C.I.	206' WW Grand Ave.	1913	1948	Rupture	Severe
30th	St.	4" C.I.	18' WE Carolina St.	1915	1947	Round Crack	Severe
38th	St.	4" C.I.	42' WW Carolina St.	1922	1946	Rupture	Severe
Battery	St.	6" C.I.	35' EW Gaffey St.	1934	1952	Joint	Mild
Fries	Ave.	12" C.I.	234' SS "B" St.	1946	1952	Joint	Severe
Old Dock	St.	16" C.I.	117' WW Long Beach	1925	1952	Joint	None
Cabrillo	Ave.	6" C.I.	12' SN 6th St.	1923	1952	Joint	Severe
Old Dock	St.	16" C.I.	500' WW Henry Ford Ave.	1925	1952	Joint	None
"E"	St.	6" C.I.	97' EE Banning Blvd.	1937	1951	Joint	None
"B"	St.	20" C.I.	98' WW Wilmington Blvd.	1913	1951	Joint	Severe
Wilmington & San Pedro	Rd.	20" C.I.	3245' EE Battery St.	1913	1951	Joint	None
Summerland	Ave.	8" C.I.	89' WW Cabrillo Ave.	1933	1951	Joint	Severe
Old Dock	St.	16" C.I.	650' WW Henry Ford Ave.	1925	1951	Joint	None
1st	St.	8" C.I.	18' EW Gaffey St.	1923	1956	Split	Severe
9th	St.	6" C.I.	214' EE Cabrillo Ave.	1931	1956	Ruptured	Severe
37th	St.	6" C.I.	23' WE Parker St.	1925	1956	Split	Severe
4th	St.	6" C.I.	248' EE Cabrillo Ave.	1920	1956	Ruptured	Severe
38th	St.	4" C.I.	212' EE Pacific Ave.	1921	1956	Split	Severe
8th	St.	4" C.I.	60' WW Cabrillo Ave.	1930	1955	Round Crack	Severe
15th	St.	6" C.I.	29' EW Centre St.	1924	1955	Split	Severe
21st	St.	6" C.I.	134' EE Meyler St.	1928	1955	Ruptured	Severe
38th	St.	4" C.I.	167' EE Cabrillo Ave.	1927	1955	Round Crack	None
38th	St.	4" C.I.	18' EE Pacific Ave.	1914	1955	Ruptured	Severe
39th	St.	4" C.I.	60' EE Pacific Ave.	1914	1955	Ruptured	Severe
30th	St.	8" C.I.	147' EE Pacific Ave.	1921	1946	Ruptured	Severe
4th	St.	8" C.I.	17' WE Gaffey St.	1923	1954	Ruptured	Severe
Alma	St.	8" C.I.	365' WW Centre St.	1924	1953	Corrosion	None
Anaheim	St.	6" C.I.	98' SS 27th St.	1920	1953	Corrosion	Severe
Anaheim	St.	6" C.I.	17' EW Foote Ave.	1928	1947	Corrosion, Hole in Lateral	None
Anaheim	St.	8" C.I.	652' E/o Sigsbee Ave.	1928	1946	Corrosion	None
Anaheim	St.	8" C.I.	578' W/o Sigsbee Ave.	1933	1946	Round Crack	None
Anaheim	St.	8" C.I.	52' EE Schley Ave.	1928	1946	Split	None
Anaheim	St.	8" C.I.	87' WW Cushing Ave.	1928	1949	Split	None
Avalon	Blvd.	20" C.I.	140' SS "E" St.	1913	1953	Split	None
Bandini	St.	6" C.I.	80' S/o Upland Ave.	1925	1946	Round Crack	None
Barracuda	St.	4" C.I.	340' SS Bass St.	1936	1949	Round Crack	Slight
Broad	Ave.	6" C.I.	90' SS "B" St.	1928	1948	Rupture	Mild
Cabrillo	Ave.	4" C.I.	302' SS 36th St.	1925	1951	Round Crack	Severe
Cabrillo	Ave.	4" C.I.	27' NS 37th St.	1925	1952	Round Crack	Severe
Cabrillo	Ave.	4" C.I.	217' SS 36th St.	1925	1953	Round Crack	Severe
Cabrillo	Ave.	6" C.I.	5' NN 12th St.	1925	1951	Split	Severe
Cabrillo	Ave.	6" C.I.	50' NN 24th St.	1928	1953	Round Crack	None
Cabrillo	Ave.	6" C.I.	108' NN Elbeon Ave.	1927	1952	Split	Severe
Carolina	St.	4" C.I.	33' SS 32nd St.	1916	1952	Round Crack	Severe
Carolina	St.	6" C.I.	25' SN Shepard St.	1917	1949	Split or Rupture	Severe

Main	St.	Main Size	Location	Main Install.	Date of Failure	Type of Break	Consecutive Index
Carolina	St.	4" C.I.	22' NS 30th St.	1915	1947	Round Crack	Severe
Carolina	St.	4" C.I.	40' NN 31st St.	1915	1948	Round Crack	Severe
Carolina	St.	4" C.I.	5' SN Hamilton Pl.	1927	1949	Split or Rupture	Severe
Carolina	St.	4" C.I.	75' SS 27th St.	1915	1952	Split or Rupture	Severe
Carolina	St.	6" C.I.	115' NN 16th St.	1913	1951	Split	Severe
Cristobal	Ave.	6" C.I.	120' NN Opp St.	1926	1953	Split	None
"D"	St.	8" C.I.	75' WW Banning Blvd.	1930	1949	Round Crack	None
"D"	St.	8" C.I.	30' WE Lakme Ave.	1930	1951	Round Crack	None
"D"	St.	8" C.I.	40' WW McFarland Ave.	1930	1955	Round Crack	Severe
"D"	St.	8" C.I.	110' WW Dominguez St.	1930	1947	Split	Severe
"D"	St.	8" C.I.	62' WW Dominguez St.	1930	1949	Round Crack	Severe
"D"	St.	8" C.I.	138' WW Dominguez St.	1930	1950	Round Crack	Severe
"D"	St.	8" C.I.	155' EE Dominguez St.	1948	1950	Rupture	Severe
Denison	Ave.	4" C.I.	191' SS 34th St.	1924	1954	Split	Severe
Denison	Ave.	6" C.I.	228' SS 32nd St.	1924	1953	Split	Severe
Old Dock	St.	10" C.I.	647' WE Alkoona Pl. (Under R.R.)	1932	1954	Round Crack	Mild
Old Dock	St.	16" C.I.	450' WW Henry Ford Ave.	1925	1951	Split and Round Crack	None
Elberon	Ave.	4" C.I.	384' W/o Leland Ave.	1929	1946	Round Crack	Severe
Elberon	Ave.	4" C.I.	172' WW Gaffey Pl.	1926	1949	Round Crack	Severe
Elberon	Ave.	4" C.I.	153' WW Cabrillo Ave.	1926	1954	Split	Severe
Elberon	Ave.	4" C.I.	65' WW Leland St.	1925	1949	Round Crack	Severe
Elberon	Ave.	6" C.I.	6' WW Gaffey St.	1926	1952	Round Crack	Severe
Emily	Ave.	4" C.I.	294' SS 36th St.	1926	1946	Corrosion	Severe
"F"	St.	6" C.I.	45' EE McDonald Ave.	1926	1952	Split	Mild
Flint	Ave.	8" C.I.	94' SS "F" St.	1929	1952	Round Crack	Severe
Fries	Ave.	6" C.I.	10' SN "G" St.	1913	1951	Split	Moderate
Fries	Ave.	6" C.I.	150' NN "C" St.	1913	1951	Rupture	Severe
Front	St.	8" C.I.	64' SS Santa Cruz St.	1928	1954	Round Crack	Moderate
"G"	St.	6" C.I.	46' EE Sanford Ave.	1928	1954	Round Crack	None
"G"	St.	6" C.I.	19' WW Watson Ave.	1928	1949	Rupture	None
Gaffey	St.	8" C.I.	130' NN 34th St.	1927	1947	Split	Severe
Gaffey	St.	8" C.I.	15' NS 30th St.	1927	1954	Rupture	Severe
Gaffey	St.	20" C.I.	Under Gaffey St. Bridge	1936	1954	Split	Moderate
Gaffey	St.	6" C.I.	21' SS 23rd St.	1927	1950	Rupture	Severe
Gaffey	St.	6" C.I.	98' SS 23rd St.	1927	1952	Round Crack	None
Gaffey	St.	8" C.I.	18' NN 29th St.	1927	1954	Split	Severe
Gaffey	St.	8" C.I.	89' SS 26th St.	1927	1951	Rupture	Severe
Gaffey	St.	8" C.I.	68' NN 30th St.	1927	1953	Rupture	Severe
Gaffey	St.	8" C.I.	49' SS 38th St.	1927	1947	Split	Severe
Gaffey	St.	8" C.I.	13' SN 39th St.	1927	1952	Split or Rupture	Severe
Gulf	Ave.	6" C.I.	184' NN "B" St.	1927	1950	Split or Rupture	None
Gulf	Ave.	6" C.I.	120' NN "B" St.	1927	1950	Split	None
Gulf	Ave.	6" C.I.	215' NN "B" St.	1927	1950	Split or Rupture	None
Hamilton	Ave.	6" C.I.	22' EE Alma St.	1928	1952	Round Crack	Severe
Hamilton	Ave.	6" C.I.	50' EE Alma St.	1928	1954	Round Crack	Severe
Henry Ford	Ave.	16" C.I.	1400' ± S/o Anaheim St.	1925	1946	Corrosion	Severe
Henry Ford	Ave.	16" C.I.	700' SS Anaheim St.	1925	1949	Round Crack	Severe
Henry Ford	Ave.	16" C.I.	1100' SS Anaheim St.	1925	1950	Round Crack	Moderate
Leland	Ave.	4" C.I.	30' NS Elberon Ave.	1924	1951	Joint	Moderate
Leland	Ave.	4" C.I.	28' SS Elberon Ave.	1924	1954	Round Crack	Severe

Main	St.	Main Size	Location	Main Infill.	D.M. of Pit	Type of Break	Corrosive Index
Leland	Ave.	4" C.I.	159' SS 31st St.	1925	1948	Round Crack	Severe
MacDonough	Ave.	8" C.I.	200' SS Anaheim St.	1930	1952	Round Crack	Severe
MacDonough	Ave.	8" C.I.	529' SS Anaheim St.	1930	1954	Round Crack	Mild
Mesa	St.	6" C.I.	68' SS Amar St.	1928	1949	Round Crack	None
Meyler	St.	6" C.I.	91' N/o 18th St.	1928	1946	Round Crack	Severe
Meyler	St.	6" C.I.	20' SS 25th St.	1928	1950	Spilt and Round Crack	Severe
Meyler	St.	6" C.I.	78' NN 24th St.	1924	1951	Spilt and Round Crack	Severe
Meyler	St.	6" C.I.	68' SS 22nd St.	1928	1949	Round Crack	Severe
Meyler	St.	6" C.I.	13' SS 21st St.	1928	1949	Round Crack	Severe
Meyler	St.	6" C.I.	48' SS 19th St.	1928	1949	Round Crack	Severe
Meyler	St.	6" C.I.	116' SS 17th St.	1928	1953	Spilt	Severe
Meyler	St.	4" C.I.	297' SS 36th St.	1925	1949	Round Crack	Severe
Old Dock	St.	16" C.I.	500' WW Henry Ford St.	1925	1949	Round Crack	None
Old Dock	St.	16" C.I.	500' WW Henry Ford St.	1925	1951	Round Crack	None
Old Dock	St.	16" C.I.	285' WW Henry Ford St.	1925	1955	Round Crack	None
Old Dock	Rd.	10" C.I.	365' SS 14th St.	1914	1946	Spilt or Rupture	Severe
Outer Harbor	Ave.	6" C.I.	15' SN Shepard St.	1915	1946	Spilt	Severe
Pacific	Ave.	6" C.I.	7' SS Shepard St.	1915	1954	Spilt	Severe
Pacific	Ave.	6" C.I.	77' NN Shepard St.	1915	1954	Spilt	Severe
Pacific	Ave.	10" C.I.	253' NN 30th St.	1915	1954	Spilt or Rupture	None
Pacific	Ave.	10" C.I.	240' SS 30th St.	1915	1954	Spilt or Rupture	None
Pacific	St.	6" C.I.	67' NN 6th St.	1924	1948	Round Crack	None
Palos Verdes	St.	6" C.I.	66' NN 6th St.	1924	1949	Round Crack	None
Palos Verdes	St.	6" C.I.	5' SN 6th St.	1927	1955	Round Crack	Severe
Paraiso	Ave.	6" C.I.	40' SS 35th St.	1928	1953	Spilt	Severe
Peck	Ave.	6" C.I.	175' SS "I" St.	1928	1952	Spilt	None
Pioneer	Ave.	6" C.I.	175' SS "G" St.	1933	1951	Round Crack	None
Pioneer	Ave.	4" C.I.	286' NN 37th St.	1925	1949	Round Crack	Severe
Roxbury	Ave.	4" C.I.	34' SS 36th St.	1925	1949	Round Crack	Severe
Roxbury	St.	4" C.I.	189' SS 36th St.	1925	1954	Round Crack	Severe
Roxbury	St.	4" C.I.	3' NS 37th St.	1925	1954	Round Crack	Severe
Roxbury	St.	6" C.I.	5' EE Gaffey St.	1913	1955	Round Crack	Severe
Santa Cruz	St.	20" C.I.	210' WW Cabrillo Ave.	1924	1946	Round Crack	Severe
Santa Cruz	St.	4" C.I.	312' WW Gaffey St.	1919	1946	Spilt or Rupture	Severe
Santa Cruz	St.	4" C.I.	84' WW Gaffey St.	1919	1948	Spilt	Severe
Santa Cruz	St.	6" C.I.	5' SN Anaheim St.	1928	1946	Spilt or Rupture	None
Schley	Ave.	10" C.I.	210' SS Altoona Pl.	1922	1949	Round Crack	None
Seaside	St.	4" C.I.	305' EE Meyler St.	1919	1946	Round Crack	Severe
Seputveda	St.	4" C.I.	62' W/o Marshall Ct.	1919	1946	Rupture	Severe
Seputveda	St.	4" C.I.	194' WW Meyler St.	1919	1946	Spilt	Severe
Seputveda	St.	4" C.I.	19' WE Cabrillo Ave.	1919	1948	Round Crack	Severe
Seputveda	St.	4" C.I.	91' E/o Gaffey St.	1923	1947	Spilt	Severe
Shepard	St.	6" C.I.	309' WW Pacific Ave.	1923	1954	Round Crack	Severe
Shepard	St.	6" C.I.	70' WW Pacific Ave.	1915	1951	Spilt or Rupture	Severe
Shepard	St.	6" C.I.	61' WW Pacific Ave.	1915	1952	Spilt	Severe
Shepard	St.	4" C.I.	108' EE Gaffey St.	1923	1947	Spilt	Severe
Summerland	Ave.	6" C.I.	145' EE Bandini St.	1925	1947	Round Crack	Moderate
Summerland	Ave.	6" C.I.	154' EE Bandini St.	1925	1952	Round Crack	Moderate
Summerland	Ave.	6" C.I.	55' EE Bandini St.	1925	1950	Round Crack	Severe
Summerland	Ave.	6" C.I.	340' WW Bandini St.	1925	1948	Round Crack	Severe

Main	St.	Main Side	Location	Main Instalt.	Date of Fail.	Type of Break	Corrosive Index
Summerland	6" C.I. Ave.	6" C.I.	393' WW Bandini St.	1925	1950	Round Crack	Severe
Summerland	Ave.	6" C.I.	250' WW Bandini St.	1925	1953	Round Crack	Severe
Terminal Way		10" C.I.	168' WW Ways St.	1918	1953	Split	Slight
Watson	Ave.	6" C.I.	165' NN Opp St.	1927	1949	Round Crack	None
Leland	Ave.	4" C.I.	81' SS Elberon Ave.	1924	1957	Round Crack	Severe
"B"	St.	20" C.I.	111' WW Gulf Ave.	1913	1955	Joint	Severe
Bandini	St.	6" C.I.	30' SS Oliver St.	1919	1955	Rupture	Severe
Bandini	St.	6" C.I.	17' SS Oliver St.	1919	1955	Round Crack	Severe
Bandini	St.	6" C.I.	47' NN Oliver St.	1919	1955	Round Crack	Severe
Bluff	Pl.	4" C.I.	219' SS 36th St.	1932	1955	Round Crack	Severe
Crestwood	St.	6" C.I.	45' WW Cabrillo Ave.	1927	1955	Split	Severe
Frigate	Ave.	12" C.I.	Int. "E" St.	1924	1955	Joint	Moderate
Harbor Fwy.,	Rd.	6" C.I.	30' NS "E" St.	1955	1955	Joint	Moderate
W. Front	St.	8" C.I.	20' NN 28th St.	1927	1955	Split	Severe
Gaffey	St.	6" C.I.	200' EE Bandini St.	1926	1955	Joint	None
Gatun	Ave.	16" C.I.	273' NN Anchorage Rd.	1948	1955	Joint	Mild
Henry Ford	Ave.	16" C.I.	N/o Cerritos Channel	1948	1955	Joint	Mild
Henry Ford	Ave.	6" C.I.	42' SS "B" St.	1926	1955	Joint	None
Island	Ave.	6" C.I.	15' EW Mahar Ave.	1955	1955	Joint	None
Mauretania	St.	16" C.I.	16' EW Mahar Ave.	1955	1955	Joint	None
Mauretania	St.	16" C.I.	5394' EE Mormon St. LB	1925	1955	Joint	None
Old Dock	St.	16" C.I.	200' SS 14th St.	1914	1955	Joint	Moderate
Outer Harbor	Rd.	10" C.I.				Rupture and Split	
Pacific	Ave.	10" C.I.	70' SS 30th St.	1915	1955	Split	Severe
Carolina	Ave.	6" C.I.	56' NN 26th St.	1945	1953	Split	None
Outer Harbor	Rd.	10" C.I.	475' SS 14th St.	1938	1953	Rupture	Severe
"D"	St.	6" C.I.	65' EE Marine Ave.	1913	1956	Split and Rupture	Severe
Gatun	St.	6" C.I.	504' WW Gaffey St.	1942	1956	Joint	None
Henry Ford	Ave.	16" C.I.	328' NS Face of Draw Bridge	1948	1956	Joint	None
Hermosa	St.	8" C.I.	5' WE LaPaloma St.	1940	1956	Joint	Mild
Cabrillo	Ave.	6" C.I.	73' NN 24th St.	1928	1956	Joint	Moderate
Avalon	Bivd.	6" C.I.	115' NN "A" St.	1912	1956	Round Crack	None
Avalon	Bivd.	20" C.I.	107' NN "C" St.	1912	1956	Rupture	None
Cabrillo	Ave.	4" C.I.	352' SS 36th St.	1925	1956	Round Crack	None
Mauretania	St.	16" C.I.	13' EW Mahar (LN) Ave.	1955	1956	Joint	Severe
Pioneer	Ave.	6" C.I.	40' NN "I" St.	1928	1956	Joint	None
Crestwood	St.	6" C.I.	70' EE Meyler St.	1927	1957	Round Crack	None
Elberon	St.	6" C.I.	314' WW Gaffey Pl.	1926	1957	Split-Rupture	Severe
Gaffey	St.	6" C.I.	45' SS 22nd St.	1927	1957	Round Crack-Rupture	Severe
Leland	St.	4" C.I.	133' SS Elberon Ave.	1924	1957	Rupture	Severe
Signal	St.	10" C.I.	407' NN 22nd St.	1914	1957	Round Crack	Severe
Watson	Ave.	8" C.I.	94' SS Opp St.	1927	1957	Joint	Severe
Anaheim	St.	20" C.I.	552' WW "I" St.	1929	1957	Round Crack	None
Seaside	Ave.	6" C.I.	91' EE Mormon St.	1925	1957	Joint	None
Elberon	St.	4" C.I.	384' WW Leland St.	1929	1957	Round Crack	None
Alma	St.	6" C.I.	84' NN Hamilton Ave.	1924	1946	Round Crack	Severe
"E"	St.	6" C.I.	16' EE Figueroa St.	1924	1952	Round Crack	Severe
Paseo Del Mar		6" C.I.	75' WW Cabrillo Ave.	1939	1952	Rupture	Moderate
				1928	1952	Rupture	Severe

Main	St.	Main Size	Location	Main Install.	Date of Fail.	Type of Break	Corrective Index
Paseo Del Mar	St.	6" C.I.	116' WW Parker St.	1928	1946	Split	Severe
Paseo Del Mar	6" C.I.	68' WW Parker St.	1928	1952	Severe		
Summerland	Ave.	6" C.I.	154' EE Bandini St.	1925	1952	Round Crack	Severe
Summerland	6" C.I.	55' EE Bandini St.	1925	1952	Severe		
Alameda	St.	6" C.I.	3' SN Young (LW) St.	1923	1946	Round Crack	None
Alameda	6" C.I.	4' SS Young (LW) St.	1923	1946	Joint	Joint	None
"B"	St.	20" C.I.	10' EE Hawaiian Ave.	1913	1946	Joint	None
On Mole							
(Barraenda St.)	Ave.	4" C.I.	100' SN End of Mole	1936	1946	Joint	Slight
Cabrillo	St.	6" C.I.	1' SN 6th St.	1923	1946	Joint	Severe
Alameda	St.	6" C.I.	31' WE Henry Ford Ave.	1923	1946	Joint	Severe
On Mole	St.	4" C.I.	110' SS Bass St.	1936	1946	Joint	Slight
Pioneer	St.	6" C.I.	12' SN Anaheim St.	1928	1946	Joint	None
Robidoux	St.	4" C.I.	496' WW Goodrich Ave.	1923	1946	Joint	None
Sanford	Ave.	6" C.I.	128' NN Anaheim Blvd.	1928	1946	Joint	Severe
Wilm.-S.P.	Rd.	6" C.I.	150' NN Anaheim Blvd.	1928	1946	Joint	Severe
Wilm.-S.P.	Rd.	20" C.I.	2985' NN Battery St.	1913	1946	Joint	None
22nd	St.	20" C.I.	3245' NN Battery St.	1913	1946	Joint	None
Priv. R./W 2526'	St.	12" C.I.	5' EW Signal St.	1942	1946	Joint	Severe
S/o Anaheim	St.	12" C.I.	16' EE Henry Ford Ave.	1924	1947	Joint	Moderate
28th	St.	6" C.I.	114' EE Cabrillo Ave.	1920	1947	Joint	None
Alma	St.	6" C.I.	140' EE Cabrillo Ave.	1920	1947	Joint	None
Anaheim	St.	6" C.I.	62' SS Hamilton St.	1928	1947	Round Crack	Severe
Anaheim	St.	8" C.I.	75' WW Farragut Ave.	1928	1947	Joint	None
Anaheim	St.	8" C.I.	150' EE Sampson Ave.	1928	1947	Joint	None
S. End Barraenda							
I.A. Yacht Club	Ave.	4" C.I.	150' SS Mole	1936	1947	Joint	Mild
Cabrillo	Rd.	8" C.I.	18' NN 30th St.	No Rec.	1947	Joint	None
Wilm.-S.P.	Ave.	10" C.I.	366' NN Story Ave.	1917	1947	Joint	Moderate
Pacific	St.	20" C.I.	17' SN 3rd St.	1914	1948	Joint	None
Anaheim	St.	6" C.I.	79' NN Pennington Ave.	1933	1948	Joint	None
Anaheim	St.	8" C.I.	358' WE end of Viaduct	1928	1948	Joint	None
Avalon	Blvd.	20" C.I.	63' WW Farragut Ave.	1913	1948	Joint	None
Gaffey	St.	20" C.I.	9' SS "F" St.	1913	1948	Joint	Slight
16th	St.	6" C.I.	158' NS Battery St.	1924	1948	Joint	Mild
Anaheim	St.	8" C.I.	74' EE Mesa St.	1913	1949	Joint	Severe
"B"	St.	8" C.I.	43' WW Farragut Ave.	1928	1949	Joint	None
Water	St.	20" C.I.	123' EE Wilmington Blvd.	1913	1949	Joint	None
Alameda	St.	10" C.I.	190' EE Fries St.	1936	1949	Joint	Severe
*Signal	St.	6" C.I.	3' SN Young St.	1923	1949	Joint	None
Wilm.-S.P.	Rd.	10" C.I.	2400' SS 22nd St.	1914	1949	Split or Rupture	Severe
Carolina	St.	20" C.I.	4007' SS Downing St.	1913	1949	Joint	None
Carolina	St.	6" C.I.	15' NN 26th St.	1945	1950	Split	Severe
Cabrillo	St.	6" C.I.	26' NN 26th St.	1945	1950	Rupture	Severe
Paseo Del Mar	St.	6" C.I.	79' NN 25th St.	1928	1951	Round Crack	None
Alma	St.	6" C.I.	35' EE Parker St.	1928	1951	Split or Rupture	Severe
Mar Vista	Ave.	6" C.I.	135' NN 36th St.	1928	1950	Joint	None
Anaheim	St.	16" C.I.	15' NS Anaheim St.	1943	1950	Joint	None
Anaheim	St.	20" C.I.	160' WW "I" St.	1929	1950	Joint	None
Anaheim	St.	20" C.I.	573' WW "I" St.	1929	1950	Joint	None
Gaffey	St.	20" C.I.	28' SN Gatun St.	1924	1950	Joint	None

Main	St.	Main Size	Location	Main Install.	Date of Fail.	Type of Break	Corrosive Index
Wilm.-S.P.	Rd.	20" C.I.	2986' NN Battery St.	1913	1950	Joint	None
Wilmington	Blvd.	12" C.I.	31' SN Anaheim St.	1931	1950	Joint	Severe
Figueroa	St.	12" C.I.	10' NN "B" St.	1924	1950	Joint	Moderate
Figueroa	St.	12" C.I.	21' NN "B" St.	1924	1950	Joint	Moderate
			E/W Prop Fence Bet.				
Berth 195		8" C.I.	McCormick & Blinn Lbr.,	1924	1948	Joint	None
			305' NN U. S. Pier				
Henry Ford	Ave.	16" C.I.	1100' SS Anaheim St.	1925	1950	Joint	Moderate
Henry Ford	Ave.	16" C.I.	1136' SS Anaheim St.	1925	1950	Joint	Moderate
1st Harb. Dept.							
N/o Cerritos Ch.	Rd.	8" C.I.	100' WW Henry Ford Blvd.	1946	1947	Joint	Severe
Sanford	Ave.	6" C.I.	Bet. Anaheim & Opp St.	1928	1946	Joint	Severe
26th	St.	4" C.I.	12' EW Cabrillo Ave.	1924	1947	Broken by Pac.	
						Pipe Line Trench	
1st Harb. Dept.						Mach.	None
N/o Cerritos Ch.	Rd.	8" C.I.	WW Henry Ford Blvd.	1946	1947	Joint	Severe
Old Dock	St.	16" C.I.	2947' EE Mormon St.	1925	1947	Broken by	
						Clam Digger	Severe
Figueroa	St.	12" C.I.	16' NN "B" St. (LE)	1924	1949	Joint	Moderate
Gatun	St.	6" C.I.	W/o Gaffey St.	1926	1949	Joint	None
Henry Ford	Ave.	16" C.I.	1400' SS Anaheim St.	1925	1950	Joint	Severe
Pacific	Ave.	20" C.I.	29' NS Upland Ave.	1914	1947	Joint	Severe
28th	St.	6" C.I.	380' EE Alma St.	1928	1947	Joint	Severe
5th	St.	6" C.I.	500' W/o Gaffey St.	1937	1947	Corrosion	Severe

In the foregoing Schedule B, which duplicates some of the items listed in Schedule A above, we have designated the main, the street, the main size, the location on the street where the break occurred, the date of installation of the main by year, the date of failure of the main by year, the type of break, and the corrosive index of the soil in which the break occurred. Except for corrosivity, we have not designated the type of soil in which the main was installed, i.e., sand, clay, etc., for the reason that the Water and Power Department records are not complete on such items. No records whatever have been kept concerning the method of manufacture of the pipe, i.e., whether it was sand cast, molded, extruded, etc.

The Water System of the Department of Water and Power of the City of Los Angeles, as far as is known, has experienced only one break, at any time, on Pier 1, Los Angeles Harbor, where Berths 57, 58, 59 and 60 are all located. See item (Signal St. 2400' SS 22nd St.), line 18, page 17, which is starred in above schedule. This break was not due to corrosion.

Interrogatory No. XVI.

“(a). Does the City have any maps of the City of Los Angeles or any parts thereof indicating the corrosivity of soils with respect to the various areas in the City?

“(b). If the answer to (a) is ‘Yes,’ state in whose custody said maps or reports thereof are.

Attach copy of maps to answers to interrogatories.

“(c). Does the City have records of underground cast iron pipe failures which show size and class of pipe, location, dates of installation and of failure, type of soil and soil resistivity or corrosivity, or any of the above?”

“(d). If the answer to (c) is ‘Yes,’ state in whose custody said records are kept.”

Answer to Interrogatory No. XVI.

(a). Maps of the area within one mile of the pierhead [50] lines established by the Federal Government at Los Angeles Harbor, indicating the corrosivity of the soils in the area, are kept by the Water System of the Department of Water and Power.

(b). Such maps are in the custody of George W. Adrian, Engineering Department, Water Distribution, Department of Water and Power of the City of Los Angeles, 410 Ducommun Street, Los Angeles, California.

Copy of Map No. 24, distribution pipe system, showing soil corrosivity indexes and underground cast iron water pipe breaks due to corrosion within twenty years after installation, set forth in Schedule A in affiant's Answer to Interrogatory No. XIII (b), is attached hereto (original only).

(c). Yes, the City Water System of the Department of Water and Power has records of under-

ground cast iron pipe failures which show size and class of pipe, location, dates of installation and of failure, and corrosivity index.

(d). Such records are kept in the custody of George W. Adrian.

Interrogatory No. XVII.

“(a). State whether or not the City has in its employ engineers who are experts with respect to corrosion of piping.

“(b). If the City has such experts in its employ, state whether or not their services were used in any way in determining the reasonable life of the piping in question.”

Answer to Interrogatory No. XVII.

(a). The Water System, Department of Water and Power, has in its employ a corrosion engineer, Robert R. Ashline, whose duties are limited to Water and Power Department matters only.

(b). The services of a corrosion engineer were not used in determining the reasonable life of the pipe in question, for the reason that said pipe was installed by the Harbor Department and not by the Department of Water and Power, approximately during the [51] year 1914, at a time when such studies and services were not carried on in the field of underground water pipe installation generally. The Department of Water and Power did not have a corrosion engineer in its employ in 1914, or for

many years thereafter, and did not at any time make any studies to determine the reasonable life of the pipe in question, laid underground at Berth 59 at or about the year 1914.

/s/ ROBERT R. ASHLINE.

Subscribed and sworn to before me this 25th day of June, 1957.

[Seal] /s/ JOHN J. DEVINE,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires July 10, 1960.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

ARTHUR W. NORDSTROM,
Assistant,

C. N. PERKINS,
Deputy,

By /s/ C. N. PERKINS,
Attorneys for Defendant
City of Los Angeles.

TRIPPET, YOAKUM,
STEARNS & BALLANTYNE,

By /s/ F. B. YOAKUM, JR.,
Of Counsel for Defendant
City of Los Angeles.

[Endorsed]: Filed July 15, 1957. [52]

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT

(For Damages)

Plaintiff Grace & Co. (Pacific Coast), a corporation, complains of defendants above named, and for cause of action alleges:

I.

Plaintiff Grace & Co. (Pacific Coast), is a corporation, organized under the laws of the State of West Virginia, and duly qualified to do business in the State of California. Defendant, The City of Los Angeles (hereinafter referred to as Defendant City) is a municipal corporation, existing under the laws of the State of California. Defendant, Outer Harbor Dock and Wharf Co. (hereinafter referred to as Defendant Outer Harbor) is a corporation, duly organized under the laws of the State of California. Defendants [54] Does 1 through 21 are individuals and/or corporations, citizens of or residents of California, whose true names are unknown to plaintiff, and who are therefore sued by said fictitious names, who participated in and are jointly liable with the defendants herein by reason of the evidence hereinafter alleged.

II.

Jurisdiction herein exists under Section 1332 of the United States Code by virtue of the fact that this is an action between citizens of different States

of the United States, involving in excess of \$3,000.00.

III.

That defendant City at all times mentioned herein owned and exclusively maintained a certain steel and concrete shed at Berth 59, Pier 1, Los Angeles Harbor in that portion of Los Angeles County known as San Pedro (hereinafter referred to as the said shed). Defendant City, together with defendant Outer Harbor at all times mentioned herein operated the said shed, for hire, for the receipt of merchandise in transit from various portions of the United States and of the world to various other portions of the United States and the world. Said shed now is and at all times mentioned herein was used to store goods brought to Los Angeles by ship while awaiting delivery of the same to the owners thereof.

IV.

Plaintiff is informed and believes and upon such information and belief alleges that defendant City possessed, controlled and operated said shed as the operator of a marine terminal in the following respects and in other and further respects not presently known to plaintiff:

Defendant City,

(a) had the power to and made all rules and regulations concerning the control, management and use of said shed;

(b) supervises the operation of the facilities [55] and properties at said shed through its

chief wharfinger and through other wharfingers assigned to said shed and various other employees some of whom are designated as auditors, plumbers, maintenance men and roving patrolmen;

(c) controls, supervises and accomplishes at its own cost and expense all maintenance and repairs at said shed;

(d) fixes the rates of dockage, wharfage, rents and other charges in connection with the use of said shed and assessed and collected such charges from all types of shippers and receivers who used said shed to store their goods and merchandise;

(e) from time to time accepts goods from virtually all types of shippers and receivers for storage in said shed and charges for said storage at established rates;

(f) has the power to and collects demurrage on all cargo that has been in said shed over a stated period of time;

(g) has the power to impress a lien on cargo that has been in said shed over a stated period of time to secure the collection of its fees and to subject the owner, shipper, consignee or carrier of such goods to personal liability for such fees;

(h) grants revocable non-exclusive licenses to private businesses to operate at the said shed and charges said licensees for dockage, wharfage and storage at said shed. In granting said licenses said defendant City reserves to itself the right to use

such space in said shed as at the time is not in use by said licensees and the obligation to at all times at its own expense keep and maintain said shed in a good and safe condition.

V.

As an integral part of said shed and the marine terminal facility operated therein as aforesaid, defendant City at all times herein mentioned exclusively owned, operated and maintained an eight-inch cast iron water pipe installed beneath said shed. Said eight-inch cast iron water pipe was installed by defendant City about the year 1914 at or about the time when the said shed was [56] constructed by said defendant City as a part of a water pipeline for supplying said shed with water.

VI.

Defendant Outer Harbor acting under a revocable, non-exclusive license granted by defendant City was at all times herein mentioned carrying on the business of and acting as terminal operators and contracting stevedores at said shed in common and jointly with the terminal operator business conducted therein by defendant City as hereinabove alleged.

VII.

Plaintiff Grace & Co. (Pacific Coast) was at all times hereinafter mentioned the owner of approximately 1,960 bags of coffee, the product of various South and Central American Countries, which said

coffee was at all times hereinafter alleged resting in said shed having been a short time prior thereto discharged by various vessels and was then and there awaiting delivery to plaintiff. Said bags of coffee were placed in said shed at the joint and in common invitation of defendant Outer Harbor and defendant City and for the benefit of both said defendants, pecuniarily and otherwise.

VIII.

Defendant City in its capacity as (a) owner of said shed and said eight-inch cast iron water pipe, (b) landlord in possession of said shed and said eight-inch cast iron water pipe and (c) as a marine terminal operator jointly and in common with defendant Outer Harbor, owed a duty to plaintiff to provide a safe shed for the interim storage of plaintiff's goods and to maintain said shed and said eight-inch cast iron water pipe in a safe and sound condition so as to prevent plaintiff's goods in said shed from becoming lost or damaged by the entry of water into said shed.

IX.

Defendant Outer Harbor as a terminal operator and [57] contracting stevedore at said shed jointly and in common with defendant City, owed a duty to plaintiff to provide a safe shed for the interim storage of plaintiff's goods and to maintain said shed and said eight-inch cast iron water pipe in a safe and sound condition so as to prevent plaintiff's goods in said shed from becoming lost or damaged by the entry of water into said shed.

X.

Defendant City and defendant Outer Harbor carelessly and negligently omitted and failed to provide a safe shed for the interim storage of plaintiff's goods in that:

(a) The floor of the said shed provided and used for such purpose by said defendants was of concrete which was poured on top of and which was dependent for support on a dirt fill which was over said eight-inch cast iron water pipe;

(b) Defendant City adopted and at all times herein mentioned pursued a policy with respect to the maintenance of said eight-inch cast iron water pipe of not inspecting said pipe or replacing the same until a break occurred and water had escaped and saturated the surrounding ground to the extent that it was detectable from the surface; and

(c) Said shed did not have adequate watchmen or other available detection devices to detect leakage from said eight-inch cast iron water pipe and/or adequate watchmen or other available device at said shed to discover the entry or presence of water in said shed.

XI.

Defendant City and defendant Outer Harbor carelessly and negligently omitted and failed to maintain said shed and said eight-inch cast iron water pipe in a safe and sound condition, but to the contrary said defendants negligently and carelessly allowed said eight-inch cast iron water pipe to be

come ancient and in a weak, corroded and decayed condition so that said pipe could not contain [58] the water under the pressure placed therein by said defendant City.

XII.

That by reason of the negligence of the defendant City and defendant Outer Harbor as aforesaid and as set forth hereinafter, beginning on a date that is unknown to plaintiff and continuing to on or about March 12, 1956, a large quantity of water escaped from said eight-inch cast iron water pipe under high pressure and on or about the 12th day of March, 1956, said large quantity of water entered said shed and wet the plaintiff's coffee to the damage of said coffee in the sum of \$30,000.00 as nearly as the same can be ascertained.

XIII.

That said damage to plaintiff's coffee was caused by the negligence of defendant City and defendant Outer Harbor as aforesaid and in the following respects:

(a) In that the defendants maintained high water pressure in said pipe without ascertaining whether said pipe was of sufficient strength at said time to withstand said pressure.

(b) In that said pipe was of such an age as, under existing conditions, to render it unsafe for the purpose intended.

(c) In that defendants failed to keep an adequate watch at said shed and to discover said leak-

age with reasonable speed, so as to move said coffee from said water as soon as possible.

(d) In other further respects which are not presently known to plaintiff.

XIV.

That on the 25th day of April, 1956, plaintiff Grace & Co. (Pacific Coast) duly and regularly filed its verified claim covering the above-mentioned damages with Walter C. Peters, the City Clerk of the City of Los Angeles. That said verified claim specified the name and address of claimant, the date and place of the action of which complaint is made, and the extent of the damage received. [59]

That the said claim has been rejected by defendant City. That nothing has been paid on account of the said claim or any part thereof.

XV.

That all and singular the premises are true and are within the jurisdiction of this Honorable Court.

Second Cause of Action

I.

Plaintiff refers to Paragraphs I, II, XIV and XV of its First Cause of Action and by reference incorporates the same herein as though set forth in full.

II.

That defendant City at all times herein mentioned exclusively owned, operated and maintained

a certain eight-inch cast iron water pipe installed beneath a certain steel and concrete shed (hereinafter referred to as said shed), situate at Berth 59, Pier 1, Los Angeles Harbor in that portion of Los Angeles County known as San Pedro.

III.

That said eight-inch cast iron water pipe was installed about the year 1914 by defendant City as a part of a water pipeline system which now is and at all times herein mentioned was owned and operated by defendant City in its proprietary capacity for supplying water to various consumers, for which purpose said defendant City maintained water meters and charged consumers at established rates for the use of said water.

IV.

Plaintiff, Grace & Co. (Pacific Coast) was at all times hereinafter mentioned the owner of approximately 1,960 bags of coffee the product of various South and Central American Countries which said coffee was at all times hereinafter alleged in the said shed having been a short time prior thereto discharged by various [60] vessels and was then and there awaiting delivery to plaintiff.

V.

That defendant City as the owner and operator of said eight-inch cast iron water pipe as aforesaid, owed a duty to plaintiff to maintain said water pipe in a reasonably safe and sound condition so as to

prevent loss or damage to plaintiff's goods stored in said shed as aforesaid by the escape of water from the said pipe, but to the contrary and with disregard for the safety of goods and merchandise in said shed, defendant City adopted and at all times herein mentioned pursued a policy with respect to the maintenance of said eight-inch cast iron water pipe of not inspecting said pipe or replacing the same until a break occurred and water had escaped and saturated the surrounding ground to the extent that it was detectable from the surface.

VI.

That defendant City negligently and carelessly omitted and failed to maintain said eight-inch cast iron water pipe in a safe and sound condition or at all and negligently and carelessly allowed said pipe to become ancient and in a weak, corroded and decayed condition so that said pipe could not contain water under the pressure placed therein by said defendant City.

VII.

That by reason of the negligence of the defendant City as aforesaid and as set forth hereinafter, beginning on a date that is unknown to plaintiff and continuing to on or about March 12, 1956, a large quantity of water escaped from said eight-inch cast iron water pipe under high pressure and on or about the 12th day of March, 1956, said large quantity of water entered said shed and wet the plaintiff's coffee to the damage of said coffee in the sum

of \$30,000.00 as nearly as the same can be ascertained.

VIII.

That said damage to plaintiff's coffee was caused by the [61] negligence of defendant City as aforesaid and in the following respects:

(a) In that defendant City maintained high water pressure in said pipe without ascertaining whether said pipe was of sufficient strength at said time to withstand said pressure.

(b) In that defendant City omitted to maintain said pipe with the result that said pipe was in such condition that it could not maintain the water pressure placed therein by defendant City.

(c) In that said pipe was of such an age as, under existing conditions, to render it unsafe for the purpose intended.

(d) In that defendants failed to keep an adequate watch or maintain available detection devices to discover said leakage from said pipe with reasonable speed.

(e) In other further respects which are not presently known to plaintiff.

Third Cause of Action

I.

Plaintiff refers to Paragraphs I, II, III, V, VII, XIV and XV of its First Cause of Action and by reference incorporates the same herein as though set forth in full.

II.

Said defendant City is a local agency under the definition of and within the meaning of Sections 53050 and 53051 of the Government Code of California. The said shed at Berth 59, Pier 1, Los Angeles Harbor in that portion of Los Angeles County known as San Pedro, owned as hereinabove alleged by defendant City and the said eight-inch cast iron water pipe installed beneath said shed and owned as hereinabove alleged by the said defendant City is public property under the definition of and within the meaning of Sections 53050 and 53051 of the Government Code of California.

III.

On or about March 12, 1956, said public property was, and [62] for many years prior to said date, the exact time being unknown by plaintiff, had been in a dangerous and defective condition, in that:

(a) Defendant City at all times herein mentioned planned, constructed, installed and maintained said public property in a manner and according to a design inherently dangerous and defective for the intended use and the use made of said public property. Plaintiff is informed and believes and upon such information and belief alleges that defendant City about the year 1914 constructed said public property according to the following plan and in the following manner: Said eight-inch cast iron water pipe was installed and buried in approxi-

mately three to four feet of earth near the water beneath what is now the said shed at Berth 59, Pier 1, Los Angeles Harbor in that portion of Los Angeles County known as San Pedro. A compacted dirt fill was placed over the top of said eight-inch cast iron water pipe. The floor of the said shed was constructed by laying a wire mesh over the top of said compacted dirt fill and pouring concrete of a depth of approximately six inches on top of said wire mesh without the use of reinforcing steel. Said floor was dependent for support on the said dirt fill and could not withstand the weight of the cargo intended to be placed thereon and which was regularly and usually placed thereon in the absence of the support of said dirt fill. With respect to the maintenance of said eight-inch cast iron water pipe, defendant City adopted and at all times herein mentioned pursued a policy of not inspecting said pipe or replacing the same until a break occurred and water had escaped and saturated the surrounding ground to the extent that it was detectable from the surface.

(b) Said shed did not have adequate watchmen or other available detection devices to detect leakage from said eight-inch cast iron water pipe and/or adequate watchmen or other available devices at said shed to discover the entry or presence of water in said shed. [63]

(c) Said eight inch cast iron water pipe was ancient and in a weak, corroded and decayed con-

dition so that said pipe could not contain water and rendered it unsafe for the purpose intended.

(d) Said eight inch cast iron water pipe was of such an age and under existing soil conditions said pipe could not reasonably have been expected to contain water under pressure therein.

(e) In other and further respects which are not presently known to plaintiff.

By reason of these premises plaintiff's goods situate in said shed were subjected to great and unreasonable risk of loss or damage from the dangerous and defective condition of said public property.

IV.

Defendant City knew and had notice or in the exercise of reasonable care in the ordinary course of the business and governmental activities it conducted should have known and had notice of the defective and dangerous condition of said public property as hereinabove alleged in Paragraph III.

V.

Plaintiff is informed and believes and on such information and belief alleges that defendant city had knowledge or notice or should have had knowledge and notice as hereinabove alleged of the following matters and conditions and others not presently known to plaintiff:

(a) That underground cast iron pipe, such as the said eight inch cast iron water pipe installed, owned

and maintained by defendant City beneath said shed as hereinabove alleged is subject to deterioration and failure from graphitic corrosion and that when such pipe is exposed to soils near the sea the rate of deterioration and failure from graphitic corrosion is greatly increased.

(b) That the danger of failure of underground cast iron pipe from graphitic corrosion in the Harbor District in that portion [64] of Los Angeles County known as San Pedro is particularly great.

(c) That the said eight inch cast iron water pipe installed, owned and maintained by defendant city beneath said shed as hereinabove alleged was of such an age, as under existing conditions, to render it unsafe and make it unreasonable to expect said pipe to contain water under pressure therein.

(d) That by failing and omitting to install and make use of available detection devices to discover leakage from said eight inch cast iron water pipe and by not inspecting said pipe or replacing the same until a failure occurred and was detected from the surface, that the goods and merchandise in said shed would be subject to great risk of loss or damage by the flooding of said shed with water.

(e) That when said eight inch cast iron water pipe failed and was unable to contain water under the pressure therein that the fill supporting the floor of said shed would be saturated with water and would subside and that the goods and merchandise in said shed would be subject to great risk of loss or

damage by the collapse of said floor and/or the flooding of said shed with water.

VI

Defendant City for a reasonable time after it knew and had notice of the dangerous and defective condition of said public property as aforesaid had ample opportunity to take action necessary to protect the public including the plaintiff herein against said condition, but negligently and carelessly failed and omitted to correct the dangerous and defective condition of said public property or to protect the public including plaintiff against the said condition or at all.

VII

That by reason of the dangerous and defective condition of said public property as hereinabove alleged and the negligence and [65] carelessness of the defendant City in failing and omitting to remedy said condition or to take action to protect the public including the plaintiff against said condition after said defendant City had knowledge and notice as aforesaid of the dangerous and defective condition and beginning on a date that is unknown to plaintiff and continuing to on or about March 12, 1956, a large quantity of water escaped from said eight inch cast iron water pipe under high pressure and on or about the 12th day of March, 1956, said large quantity of water entered said shed and wet the plaintiff's coffee to the damage of said coffee in the sum of \$30,000 as nearly as the same can be ascertained.

Wherefore, plaintiff prays judgment against defendants as follows:

1. That plaintiff have and recover from defendants the sum of \$30,000.00
2. That plaintiff have and recover interest and costs herein with such other and further relief as the Court may deem just and proper in the premises.

McCUTCHEN, BLACK,
HARNAGEL & SHEA,

By /s/ PHILIP K. VERLEGER,
Attorneys for Plaintiff,
Grace & Co. (Pacific Coast).

Duly verified.

[Endorsed]: Filed August 12, 1958.

[Title of District Court and Cause.]

ANSWER OF CITY OF LOS ANGELES TO
PLAINTIFF'S SUPPLEMENTAL INTER-
ROGATORIES

State of California,
County of Los Angeles—ss.

A. R. Martin, being duly sworn, deposes and says:

I am Assistant Harbor Engineer of the Harbor Department of the City of Los Angeles; from information obtained from personal knowledge,

investigation, reports of subordinate employees acting under my supervision, and records and files of the Harbor Department, I make the following answers to plaintiff's Supplemental Interrogatories:

Interrogatory No. 1

State whether or not there was any water meter or water meters connected to the water line or to the main supplying said water line, from which the water escaped in the present case, [68] particularly including any detector meters, on the line or lines connecting the Water Department main in Signal Street with the Harbor Department sprinkler main in Signal Street.

Answer to Interrogatory No. 1

Yes.

Interrogatory No. 2

State whether or not any person read said meters, or any of them, at any time.

Answer to Interrogatory No. 2

On information and belief I am informed that By-Pass Meters (sometimes called detector meters) were read by an employee of the Department of Water & Power.

Interrogatory No. 3

Were any of said water meters read within the three months next preceding March 12, 1956?

Answer to Interrogatory No. 3

Yes.

Interrogatory No. 4

If the answer to Interrogatory No. 3 is "yes," state:

(a) The name, description and location of each said meter;

(b) The date on which each said meter was read;

(c) The manner in which the reading was recorded, if it was so recorded;

(d) The person to whom the meter readings were given and the use made of them, if any. [69]

(e) The name and address of each person reading said meter.

Answer to Interrogatory No. 4

(a) Service No. 2690—a 1-inch Hersey By-Pass Meter, No. 1350948, located near Berth 60 and about 5 feet east of the west line of Signal Street.

Service No. 2692— a 1-inch Hersey By-Pass Meter, No. 1350944, located near Berth 58 and about 4 feet east of the west line of Signal Street.

Service No. 8849—a 1-inch Hersey By-Pass Meter, No. 1350937, located near Berth 57 and about 4 feet east of the west line of Signal Street.

(b) On information and belief I am informed each of these three meters was read by an employee

of the Department of Water & Power on January 7, 1956, two of them were read on February 4, 1956, and the third (Service No. 8849) was read on February 9, 1956, and all three of them were read March 1, 1956.

(c) On information and belief I am informed that the readings were recorded on the Automatic Sprinkler Service Records of the Department of Water & Power.

(d) On information and belief I am informed the meter readings were given to someone in the billing department of the Department of Water & Power and thereafter bills were submitted to the accounting department of the Harbor Department.

(e) On information and belief I am informed the name and address of the employee of the Department of Water & [70] Power who read the three meters on the dates in question is Charles C. Connor, 127 West 87th Street, Los Angeles.

Interrogatory No. 5

State whether any records exist of the reading of said meters during any of the said period.

Answer to Interrogatory No. 5

Yes.

Interrogatory No. 6

State whether, upon the reading of said meters, any flow of water was indicated.

Answer to Interrogatory No. 6

On information and belief I am informed that on some of the occasions in question a flow of water was indicated.

Interrogatory No. 7

If the answer to Interrogatory No. 6 is "Yes," state:

- (a) The date when said flow was indicated;
- (b) The rate and amount of said flow;
- (c) The cause of said flow, if it was established;
- (d) What, if anything, was done to stop said flow;
- (e) Whether such measure was successful in stopping said flow.

Answer to Interrogatory No. 7

(a) On information and belief I am informed that the flow was indicated during the period or a portion of the period approximately 30 days [71] preceding the reading of the meters.

(b) The amount of the flow was as follows (measured in 100 cu. ft.):

Date of Reading	Service No. 2690	Service No. 2692	Service No. 8849
1/7/56	25	8	1
2/4/56	38	6	
2/9/56			1
3/1/56	29	5	None

(c) There are various causes for the flow. There was about 6000 feet of underground pipe on this one fire prevention system and in said pipe there were about 600 leaded joints or about 10 leaded joints per 100 feet. Some of the causes, but not necessarily all, are as follows:

1. Minor leaks in the joints.
2. There were 36 2-inch drain valves which sometimes leak and are sometimes turned on when working on the system.
3. There were 36 $\frac{3}{4}$ -inch inspector's test valves which are used for testing whether the fire system is working and whenever these test valves are turned on a flow may be registered through the By-Pass Meters.
4. Improper seating of the alarm valves.
5. If there is a surge in the pressure the alarm valves will open and the water will go into a closed drain. The water mentioned in explanations 2 and 3 also goes into the same closed drain and is not apparent.
6. Longshoremen or other persons will sometimes "skylark" by turning on the fire hoses that are [72] present in the transit sheds merely for the fun or thrill of seeing water under pressure. There were 36 fire hose valves in the system on March 12, 1956.

(d) As leaks became known they would be repaired, and when valves were found turned on they

would be turned off, or if observed leaking they would be repaired.

(e) Stopping the flow was successful when a leak was discovered and repaired or a turned-on faucet was found and closed.

Interrogatory No. 8

State the name and address of the person or persons having custody of the records referred to above, and the place where said records are kept.

Answer to Interrogatory No. 8

The monthly bills which the Department of Water & Power submitted to the Harbor Department are kept in the accounting division of the Harbor Department at the City Hall in San Pedro in the office of W. J. Bullock.

On information and belief the meter readings made by the Department of Water & Power are kept by the Department of Water & Power in San Pedro.

Interrogatory No. 9

If the answer to Interrogatory No. 1 is "Yes," state the name, description and location of each said meter.

Answer to Interrogatory No. 9

Interrogatory No. 9 has already been answered in the [73] answer to Interrogatory No. 4(a).

/s/ A. R. MARTIN.

Subscribed and sworn to before me this 24th day of September, 1958.

[Seal] /s/ LILLIAN B. KINZY,
Notary Public, in and for Said
County and State.

[Endorsed]: Filed September 26, 1958. [74]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It is hereby stipulated by and between counsel for plaintiff Grace & Co. (Pacific Coast), a corporation, and the defendants, The City of Los Angeles, a municipal corporation, Outer Harbor Dock and Wharf Company, a California corporation, and Third-Party Defendant Grace Line, Inc., that plaintiff Grace & Co. (Pacific Coast) may file its Second Amended Complaint herein and that any new matter therein alleged except as admitted or affirmatively alleged by way of answer to the First Amended [76] Complaint shall be deemed denied without further answer by the named defendants herein.

Dated: August 11, 1958.

McCUTCHEN, BLACK,
HARNAGEL, & SHEA,

By /s/ HOWARD J. PRIVETT,
Attorneys for Plaintiff,
Grace & Co. (Pacific Coast).

ROGER ARNEBERGH,
City Attorney,
ARTHUR W. NORDSTROM,
Assistant,
C. N. PERKINS,
Deputy,

8/11/58.

By /s/ F. B. YOAKUM JR.,
Attorneys for Defendant,
The City of Los Angeles.

TRIPPETT, YOAKUM,
STEARNS & BALLANTYNE,

By /s/ F. B. YOAKUM, JR.,
Of Counsel for Defendant,
The City of Los Angeles.

8/12/58

OVERTON, LYMAN
AND PRINCE,

By /s/ AUGUST FELANDO,
Attorneys for Defendant, Outer Harbor Dock and
Wharf Co.

LILLICK, GEARY, McHOSE, ROETHKE &
MYERS,

By /s/ DAVID L. HAYUTUI,
Attorneys for Third-Party
Defendant, Grace Line, Inc.

It is so ordered: August 12, 1958.

/s/ BEN HARRISON.

[Endorsed]: Filed August 12, 1958. [77]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It is hereby stipulated by and between the parties hereto that the trial on October 6, 1958, in the above-entitled action shall be on the issue of liability only and that if an interlocutory judgment is made determining liability to be upon defendants, a subsequent date shall be set thereafter for a trial on the issue of damages. [78]

Dated: September 23, 1958.

McCUTCHEN, BLACK,
HARNAGEL & SHEA,

By /s/ ANN E. STODDER,
Attorneys for Plaintiff,
Grace & Co. (Pacific Coast).

ROGER ARNEBERGH,
City Attorney,
ARTHUR W. NORDSTROM,
Assistant,
C. N. PERKINS,
Deputy,

By /s/ F. B. YOAKUM JR.,
Attorneys for Defendant,
The City of Los Angeles.

TRIPPETT, YOAKUM,
STEARNS & BALLANTYNE,

By /s/ F. B. YOAKUM JR.,
Of Counsel for Defendant,
The City of Los Angeles.

OVERTON, LYMAN AND
PRINCE,

By /s/ DAN BRENNAR,

Attorneys for Defendant, Outer Harbor Dock and
Wharf Co.

LILLICK, GEARY, McHOSE, ROETHKE &
MYERS,

By /s/ J. ROBERT ROETHKE,

Attorneys for Third-Party
Defendant, Grace Line, Inc.

It is so ordered: September 26, 1958.

/s/ HARRY C. WESTOVER,

United States District Judge.

[Endorsed]: Filed September 26, 1958.

[Title of District Court and Cause.]

MEMORANDUM OF OPINION

Defendant, City of Los Angeles, was and now is the owner of Berth 59, Los Angeles Harbor, and together with defendant, Outer Harbor Dock and Wharf Co., operated a certain steel and concrete shed at Berth 59 in that portion of Los Angeles County known as San Pedro.

Plaintiff was the owner of approximately 1,960 bags of coffee, which had been stored in the shed at

Berth 59 after having been discharged by various vessels and was awaiting delivery to plaintiff. [80]

Defendants maintained in the public street adjacent to the shed at Berth 59 a certain 8-inch cast-iron water pipe-line. A lateral line leading into the shed from the 8-inch pipe burst, allowing a great quantity of water to escape from the pipe-line under high pressure, which water flooded the floor of the shed at Berth 59 and damaged plaintiff's coffee.

Plaintiff alleges the defendants permitted the pipe to remain beneath the shed, although defendants knew or in the exercise of due care should have known that the pipe was in an ancient, weak, corroded and decaying condition, so that the pipe could not have reasonably been expected to contain water under high pressure.

At the time the pipe was installed, it was the best pipe available. Plaintiff makes no contention that the pipe-line or the lateral where the break occurred was negligently installed. At the time of installation defendants did not know of the corrosive nature of the soil, but subsequent to the installation the City, or some of its departments, became cognizant that the soil in the harbor area was highly corrosive. Based upon economic consideration, defendants established a policy of doing nothing about maintaining, repairing or replacing such water pipe-lines until a leak occurred and water was discovered on the surface of the ground.

Plaintiff contends defendants knew or should have

known that the pipe was located in highly corrosive soil and, over the period of years involved, defendants should have conducted some sort of inspection to ascertain if the pipe had corroded in order to determine whether there was likelihood of the pipe bursting. Plaintiffs contend that failure to make an inspection for forty years was negligence. [81]

At the trial experts testified the pipe in question failed because of graphitic corrosion. Graphitic corrosion occurs when iron in pipe is leached out and replaced by graphite. The leaching of the iron from the pipe and the replacement thereof by graphite occurs over a long period of time and does not change the pipe shape or contour. The only effect upon the pipe is that it loses strength so that under pressure the pipe in those particular spots where graphitic corrosion occurs gives way.

Plaintiffs contend defendants had knowledge that a break was imminent, for some months prior thereto there appeared to be a leakage in the system of more than one hundred thirty (130.00) cubic feet of water per day. However, experts testified at the trial that in a graphitic corrosion break there is no gradual leakage, but that the surface of the pipe gives way all at once and thus allows water to spurt from the pipe.

After defendants received notice of the break in the pipe, the line was repaired by cutting out an eight- or ten-foot length of pipe and inserting herein a new piece of cast-iron pipe. Defendants'

employees found in the pipe removed an opening caused by graphitic corrosion, approximately the size of a human hand. They also discovered that within a short distance on either side of the opening the pipe was in sound condition, so that it could be continued in use.

Plaintiff contends defendants are liable under two theories, the first being under the doctrine of *Rylands vs. Fletcher* (1860) L.R. 3, H.L. 330—(liability without fault or absolute liability)—and, second negligence. [82]

Absolute Liability

Judge Yankwich of this court discusses *Rylands vs. Fletcher* in *Gainey vs. Folkman*, 114 F. Supp. 231, saying at page 233:

“This case [*Rylands vs. Fletcher*] was the starting point of a theory of liability which sought to depart from the old rule which postulated liability only upon the existence of fault or negligence. It envisaged situations where, despite the absence of fault or negligence, the use of one’s property might be detrimental to others. Today the trend is to fasten liability if the result of the use constitutes a nuisance as to the adjoining owner.”

The plaintiff in the above case contended that dusting of agricultural crops by the defendant had caused damage to alfalfa which was growing on plaintiff’s land. Judge Yankwich stated:

“* * * Even the most extreme application of the doctrine of *Rylands vs. Fletcher* would not warrant interference with a legitimate process, the dusting of plants of one's own property to control insect infestation * * *”

The rule in California is stated by the California Supreme Court in *Green vs. General Petroleum Corp.*, 205 Cal. 328. At page 332 the Court said:

“* * * The rule is laid down in the decisions that a defendant is not liable unless he has been guilty of negligence. It has many variations. For instance, there is [83] found in our reports the declaration that when a person engaged in a lawful business exercises due care, the law does not make him an insurer of others against those consequences of his acts which reasonable care and foresight could not have prevented * * *”

“* * * It ought to be, and we are of the view that it is the rule that, where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage, regardless of any element of negligence either in the doing of the act or in the construction, use or maintenance of the object or instrumentality that may have caused the injury.

“* * * [We are led] to the conclusion that the rule that injury may exist without liability is, as

has been so well stated by another court, 'contrary to the general rule of liability where injury is caused; and since, in a sense, it is a preference of the rights of one property owner or user over that of another; and since the law is a jealous guardian of the right to lawfully use property without interference or diminution; and since the rule of "sic utere tuo ut alienum non laedas" is of broad and fundamental importance — the rule which allows such injury without liability therefore is an exception which is and should be narrowly limited [84] and carefully confined.' (Sussex Land etc. Co. vs. Midwest Refining Co., 294 Fed. 597, 607.) * * *

In the case at bar, there was the interposition of an external, independent agency which could not have been and was not foreseen by the defendants at the time the pipe was installed. The evidence indicates the defendants did not know the pipe was laid in corrosive soil and did not obtain such information until many years after its installation.

The United States Court of Appeals for the Tenth Circuit, in *Anderson-Prichard Oil Corporation vs. Parker*, 245 F.2d 831, sustained a jury instruction given by the lower court to the effect that under the facts as presented to the jury there was no liability without fault.

Former District Judge Hamlin of the Northern District of California (now a member of the United States Court of Appeals for the Ninth Circuit) in *Atkinson Co. vs. Merrit, Chapman & Scott Corp*

123 F.Supp. 720 (1954), discussed the problem of liability without fault in California. Prior to Judge Hamlin's decision, Judge James H. Oakley, sitting in the Superior Court of the State of California, in and for the County of Sacramento, wrote a memorandum of opinion dealing with the question of liability without fault. In his opinion Judge Hamlin points out that aside from the opinion of Judge Oakley there are three cases in California that indicate the Rylands vs. Fletcher doctrine does not apply in California—Sutliff vs. Sweetwater Water Company (1920), 182 Cal. 34; Smith vs. East Bay Municipal Utility Dist., 1954) 122 Cal. App. 2d 613, and Curci vs. Palos Verde Irrigation District (1945), 69 Cal. App. 2d 583. [85]

Judge Hamlin also states that plaintiff relied upon three principal cases—Kall vs. Carruthers (1922), 59 Cal. App. 555, Parker vs. Larsen (1890), 86 Cal. 236, and Nola vs. Orlando (1932), 119 Cal. App. 518. He points out that these three cases all involve seepage of water, impounded by the defendants, onto land of plaintiffs. In all three cases recovery of damages and injunctions were permitted without proof of negligence. Judge Hamlin concludes:

“The court is of the opinion that the law of California is as stated by Judge Oakley and that this case is more clearly analogous to the Sutliff case, and that liability without fault under the Fletcher doctrine will not lie.”

In Schindler vs. Standard Oil Company of Indiana, 232 S.W. 735, the Court held there could be no

recovery for damage caused by a leak in a water pipe on adjoining premises in the absence of negligence on the part of the adjoining land owner in the original construction of the pipe or in discovering or repairing known defects.

Judge Peirson M. Hall of this court, while a judge of the Superior Court of the State of California, in and for the County of Los Angeles, in Case No. 45697, Hubert F. Laugharn, etc. vs. Bolsa Chica Oil Corporation (July, 1941), wrote an excellent opinion in which he discussed the law relative to liability in the absence of negligence. In that case, the driller of an oil well forced drilling mud into a well under hydrostatic pressure which mud, according to the plaintiff, traveled through the underground structure from defendant's well into plaintiff's well, thereby causing damage to plaintiff's well. [86]

Plaintiff filed a complaint in two counts, the first count being based upon the theory of absolute liability for injury done to plaintiff. In the second count, the acts of defendant in drilling its well were alleged to have been negligently performed. Upon demurrer to the first cause of action the Court, after exhaustive review of the authorities in California and elsewhere, held the doctrine of Rylands vs. Fletcher did not apply and that although plaintiff suffered damage he could not recover unless he could show the damage was caused by negligence on the part of defendant.

In the case at bar we are inclined to follow the rule as set forth in *Green vs. General Petroleum*

Corp., *supra*. The Court is of the opinion Judge Hamlin has set forth the proper rule to be applied in California and that the Fletcher vs. Rylands doctrine does not apply in the case at bar.

Negligence

If, in the case at bar, the Court is to find for plaintiff, it will be necessary to find defendants have been negligent either in the installation, maintenance or inspection of the pipe in question. As stated before, there is no contention by plaintiff that the pipe was negligently installed; hence, the negligence, if any, would have to be found in the City's failure to inspect the pipe. Plaintiff's entire case rests upon the theory that defendants were negligent in failing to make inspection of the pipe-line during a period of forty years to determine its condition. Plaintiff alleges there was a duty on the part of defendants to inspect and, if defendants did not inspect, they were negligent. Plaintiff admits, however, there was no reasonable manner in which the line could be adequately [87] inspected, other than to excavate the soil along the pipe-line and make physical inspection thereof.

The pipe-line was some ten feet beneath the surface of the ground. The break occurred in a lateral leading into the shed under a cement platform adjacent to Berth 59. To make an inspection, it would have been necessary for the City to excavate the line in its entirety, including the line under the cement

platform, which would mean the breaking of the cement platform to get to the pipe below.

According to the testimony of experts, graphitic corrosion occurs sporadically. Graphitic corrosion may occur on the top of the pipe and not on the bottom, or on one side and not the other. Graphitic corrosion may occur in one spot and then may not occur for many feet along the line. It would be necessary to excavate around the entire pipe to locate a corroded area. An examination of the upper half of the pipe would not be sufficient because graphitic corrosion could manifest itself on the lower portion of the pipe and not on the top or sides. To make complete inspection it would be necessary to remove the earth from beneath the line. The removal of earth from beneath the pipe would remove its support, putting a strain upon the pipe itself, and might cause a sinking or bending of the pipe, occasioning damage more extensive than the corrosion itself.

Testimony at the trial indicated the City of Los Angeles has adopted a "do nothing" policy regarding inspection of its water lines. It places water lines in the earth and then neither makes inspection nor replacement until leaks occur. When leaks develop they are repaired. When they become too numerous the pipe-line is replaced. [88]

Defendants contend that when the line was installed it was the best pipe available and that such cast-iron pipe will ordinarily last for many, many years. In fact, evidence indicated that in Pennsyl-

vania similar cast-iron pipe has been in use for more than 150 years in a non-corrosive soil.

If any policy has been adopted by municipalities in California, the policy is the same as that followed by the City of Los Angeles; that is, that after cast-iron water pipe is installed the line is used without inspection or replacement until there are sufficient breaks to indicate the pipe has corroded or has become undependable. Defendants contend there was nothing to indicate the break in question was imminent or the line undependable. In fact, the line was repaired and returned to use, and so far as this Court is informed is in use today.

Negligence is a question of fact to be determined from all the surrounding circumstances. Although it might have been desirable to make an inspection of the water lines every two or three years, such inspection would be prohibitively expensive and economically unfeasible. The City, like individuals, is required to take only reasonable precautions.

Although there is some evidence that in other parts of the harbor area there had been pipe failure because of graphitic corrosion, nevertheless, we are of the opinion that considering all the evidence in this case the City was not negligent in failing to inspect the pipe.

Judgment will be for defendants. Counsel for defendants shall prepare findings of fact, conclusions of law and judgment in accordance with the rule.

Dated: November 24, 1958.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed November 24, 1958. [89]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF FACT

In accordance with F.R.C.P. Rules 46 and 52, plaintiff objects to the following Findings of Fact submitted by the defendant, City of Los Angeles:

1. Finding 3 is objected to. After finding that the shed was used “* * * for the receipt and shipment of goods to and from Los Angeles Harbor.” The proposed Findings go on to say that “The remaining allegations of paragraph III of the Second Amended Complaint are untrue * * *” The remaining portion of said paragraph III of the Second Amended Complaint provides that the shed in question was used “* * * for hire, for the receipt of merchandise in transit from various portions of the United States and of the world to various other portions of the United States and the world * * *” and that “* * * Said shed now is and at all times mentioned herein was used to store goods brought to Los Angeles by ship while awaiting [90] delivery of the same to the owners hereof.”

All of the underlined language is true, and is without contradiction in the evidence.

2. Defendant has submitted no proposed finding with respect to the allegations of Paragraph IV of the Second Amended Complaint, stating these allegations are immaterial. Said Paragraph IV describes the operation by the City of the terminal. There is no contradiction thereof in the evidence. This paragraph is material in that it relates to the City's duty of care. Therefore, the following finding is requested:

"The allegations of Paragraph IV of the Second Amended Complaint are found to be true."

3. Plaintiff objects to the following portions of Finding 5:

"The purpose of said pipe line and lateral was solely to furnish fire protection to the shed, its loading dock, its wharf, to ships moored at the wharf and to other property and appurtenances in the nearby vicinity."

Plaintiff requests that the quoted portion be amended as follows:

The purpose of said lateral was solely to furnish water to the overhead sprinkler system and the thirty-six hydrants to which fire hoses were attached in the transit shed.

The proposed Findings go on to say:

"The remaining allegations of paragraph V of the Second Amended Complaint are untrue."

That is objected to as contrary to the evidence.

4. Plaintiff objects to the following portion of proposed Finding 7: [91]

“The remaining allegations of paragraph VII are untrue.”

The remaining allegations referred to are the following:

“* * * Said bags of coffee were placed in said shed at the joint and in common invitation of defendant Outer Harbor and defendant City and for the benefit of both said defendants, pecuniarily and otherwise.”

The foregoing should be found to be true as to the City, there being no contradiction in the evidence with respect to it.

5. Plaintiff objects to Findings 8, 9, 11, 12, 13, 15, 16, 17, 18, 19, 21, 22, 23, 24 and 25 of the proposed Findings. Each of these findings relate to the capacity of, the duty of, care of and the negligence of the City. In place of them, it is proposed that the Court find as follows:

“That Paragraphs VIII, X, XI, XII and XIII of the First Cause of Action are true.”

“That Paragraphs III, IV, V, VI, VII and VIII of the Second Cause of Action are true.”

“That as to Paragraphs II, III, IV, V, VI and VII of the Third Cause of Action the City was not operating in a governmental capacity but the City had knowledge and reasonable opportunity to repair the dangerous and de-

fective condition of public property created by the corrosion decay of the pipe under the loading platform floor of the transit shed.”

In behalf of said objections, the following is submitted:

It is respectfully submitted that the evidence shows, without contradiction, that the City was operating a terminal in its proprietary capacity incident to the transportation of goods by common carriers at sea. As such, if it was not a carrier, it was [92] in a parallel situation and subject to the highest duty of care. The evidence also shows, without contradiction, that the soil at Berth 59 was highly corrosive; that cast-iron pipe has not been newly installed in such soil for at least twenty (20) years, because it is known to be unsuited to such soil; that pipes in the immediate vicinity had failed many years before, and that there had been numerous such failures in the Harbor area. The evidence also shows, without contradiction, that there was leakage from the pipes in question prior to the failure which did the damage. One of the City's own witnesses testified that such leakage calls for an inspection. Had there been an inspection, it can hardly be doubted that the corrosion that caused this failure would have been discovered. In contrast to this evidence, there was submitted only the proposition that public utilities generally do not dig up such pipes. It is submitted that such conduct on the part of the City is negligent, as against the owners

of the goods, for the reason that instead of exercising a high duty of care, no care at all is provided.

It is respectfully submitted that under the circumstances, the Findings proposed should be rejected, and Findings that the defendant was under a duty of care, and did nothing, thereby being guilty of negligence should be made; and that we be allowed to draft such findings in detail. If we may be allowed to use an analogy, we would submit that proof of a custom to drive automobiles without brakes, if there were such a custom, would not establish that such conduct is prudent, nor that it meets the standard of care imposed on a public organization occupying a position somewhere between that of a carrier and that of an ordinary bailee.

Dated: December 3, 1958.

Respectfully submitted,

McCUTCHEN, BLACK
HARNAGEL & SHEA,
PHILIP K. VERLEGER,
HOWARD J. PRIVETT,

By /s/ PHILIP K. VERLEGER,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed December 3, 1958.

In the District Court of the United States, Southern
District of California, Central Division

Civil No. 20624-HW

GRACE & CO. (Pacific Coast), a Corporation,
Plaintiff,

vs.

THE CITY OF LOS ANGELES, a Municipal
Corporation, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

This cause came on for trial on October 7, 1958, Honorable Harry C. Westover, judge presiding. Plaintiff was represented by McCutchen, Black, Harnagel & Shea, by Philip K. Verleger, Esq., and Howard J. Privett, Esq., and defendant City of Los Angeles (sued herein as The City of Los Angeles), a municipal corporation, was represented by Roger Arnebergh, city attorney, Arthur W. Nordstrom, assistant city attorney, C. N. Perkins, deputy city attorney, and Trippet, Yoakum, Stearns & Ballantyne, by F. B. Yoakum, Jr., Esq., of counsel for City of Los Angeles. Prior to conclusion of the evidence and submission of the case, the action was, by written stipulation and written approval by the Court, dismissed by plaintiff against Outer Harbor Dock & Wharf Co. (also known as The Uniharbor Corporation), hereafter called "Uniharbor"; Uniharbor dismissed its alleged cause of action against plaintiff Grace & Co (Pacific Coast) and against

Grace Line, Inc., Grace Line Inc., and Uniharbor also [95] dismissed their causes of action against City of Los Angeles; thereafter the case proceeded to trial between Grace & Co. (Pacific Coast) and City of Los Angeles on plaintiff's Second Amended Complaint and the City of Los Angeles' Answer to plaintiff's Amended Complaint, the allegations of the Second Amended Complaint being deemed denied by the City of Los Angeles.

The Court having duly considered the evidence and the law, it now therefore makes its

Findings of Fact

1. Plaintiff Grace & Co. (Pacific Coast) is a corporation organized under the laws of the State of West Virginia and duly qualified to do business in California. Defendant City of Los Angeles (hereafter called "City") is a municipal corporation existing under the laws of California.

2. The Court has jurisdiction herein by virtue of section 1332 of the United States Judicial Code and Judiciary by virtue of the fact that this is an action between citizens of different states of the United States involving in excess of \$3,000.00 exclusive of interest and costs.

3. At all times mentioned in the Second Amended Complaint the City owned and operated by and through its Harbor Department a steel and concrete shed at Berth 59, Pier 1, Los Angeles Harbor, in that portion of Los Angeles County known as San Pedro; said shed was used for the receipt and shipment of goods to and from Los Angeles Harbor.

The remaining allegations of paragraph III of the Second Amended Complaint are untrue insofar as they refer to the City.

4. The Court makes no finding concerning the allegations of paragraph IV of the Second Amended Complaint for the reason that they are immaterial in view of the finding hereafter made that the City was not negligent.

5. The City, by and through its Harbor Department, at all times herein mentioned, maintained in the public street adjacent to the shed at Berth 59 an 8-inch cast-iron water pipe and an 8-inch lateral therefrom leading to said shed. Said pipe and lateral were installed by said Harbor Department about 1914 and at about the same time shed was constructed by the Harbor Department of the City. The purpose of said pipe line and lateral was solely to furnish fire protection to the shed, its loading dock, its wharf, to ships moored at the wharf and to other property and appurtenances in the nearby vicinity.

The remaining allegations of paragraph V of the Second Amended Complaint are untrue.

6. The Court makes no finding concerning the allegations of paragraph VI for the reason that defendant Uniharbor was dismissed from the action.

7. Plaintiff on March 12, 1956, was presumptively the owner of approximately 1960 bags of coffee which had been stored in said shed at Berth 59 after having been discharged by various vessels and

was awaiting delivery to plaintiff. The Court makes no finding concerning the ownership by plaintiff of any specific quantity of coffee for the reason that the trial herein was limited solely to the question of the liability of the City. Hence it was assumed only for the purpose of determining the question of liability that plaintiff owned 1960 bags of coffee.

The remaining allegations of paragraph VII are untrue.

8. The allegations of Paragraph VIII insofar as they refer to the City are untrue except that it is true that the City owned a cast iron pipe as more specifically found in paragraph 5 hereof.

9. The Court makes no finding concerning the allegations of paragraph IX for the reason that defendant Uniharbor was dismissed from the action.

10. Defendant City did not carelessly or negligently or otherwise omit or fail to provide a safe shed for the interim, or other storage, of any of plaintiff's goods for any of the reasons alleged in paragraph X of the Second Amended Complaint, or for any other reason.

The remaining allegations of paragraph X are untrue in so far as they refer to the City.

11. The allegations of paragraph XI of the Second Amended Complaint insofar as they refer to the City are untrue, except it is true that the City adopted a policy of not maintaining, repairing or replacing its buried water pipe lines until some trouble was reported or some evidence of leakage

developed. The Court finds that the City was not negligent in the maintenance of said cast iron water pipe.

12. It is true that on March 12, 1956, a large quantity of water escaped from the aforesaid 8-inch cast iron lateral pipe under a pressure of approximately 65 pounds per square inch, which water flooded the floor of the shed at Berth 59 and damaged the coffee which, for the purposes of these Findings, is assumed was owned by plaintiff. The Court makes no finding respecting the extent, if any, of damage to said coffee. It is untrue that said damage, if any, was caused by the negligence of the City.

The remaining allegations of paragraph XII of the Second Amended Complaint are untrue.

13. The allegations of paragraph XIII of the Second Amended Complaint are untrue and in this connection the Court finds that the City was not negligent in maintaining, operating or installing the pipe which burst on March 12, 1956, or in failing to keep an adequate or any watch at said shed or in failing to discover the leakage with reasonable speed, or in any other respect.

14. The allegations of paragraph XIV of the Second Amended Complaint are true.

15. It is true that the matters alleged in the [98] Second Amended Complaint are within the jurisdiction of this Court but all allegations contained herein are untrue except as herein expressly found to be true.

16. It is true that said 8-inch cast iron water pipe was installed by the Harbor Department of the City in 1914 as a part of a water fire line system which at all times mentioned in the Second Amended Complaint was under the control of and operated by the Harbor Department of the City solely for the purpose of providing water for fire fighting and fire prevention.

The remaining allegations of paragraph III of the Second Cause of Action are untrue.

17. The allegations of paragraph V of the Second Cause of Action are untrue, except as found in paragraph 11 hereof.

18. The allegations of paragraph VI of the Second Cause of Action are untrue.

19. It is untrue that the damage, if any, to the coffee assumed to be owned by plaintiff was caused by the negligence of the City in any respect whatever.

20. It is true that the City is a local agency under the definition and within the meaning of sections 53050 and 53051 of the Government Code of California; and that the shed at Berth 59, Pier 1, Los Angeles Harbor in that portion of Los Angeles County known as San Pedro, is and on March 12, 1956, was owned by the City and that said 8-inch cast iron water pipes installed beneath the streets outside of said shed and owned and operated by the Harbor Department of the City is public property under the definition of and within the meaning of

sections 53050 and 53051 of the Government Code of California.

The remaining allegations of paragraph II of the Third Cause of Action are untrue.

21. It is untrue that on or about March 12, 1956, or at any time prior thereto, the City or its Harbor Department planned, constructed, installed or maintained its said pipe line in a manner [99] or according to a design inherently, or otherwise, dangerous or defective for the intended use or the use made of said property. It is true that said cast iron pipe was installed about 1914 by the Harbor Department of the City and was buried approximately 9 to 10 feet underground and under a concrete floor or loading dock or platform and covered with a compacted dirt fill, and that the City followed a policy of not inspecting such buried pipe or replacing the same until some trouble was reported or some evidence of leakage developed.

The remaining allegations of paragraph III of the Third Cause of Action are untrue.

22. The allegations of paragraph IV of the Third Cause of Action are untrue.

23. The allegations of paragraph V of the Third Cause of Action are untrue.

24. The allegations of paragraph VI of the Third Cause of Action are untrue.

25. The allegations of paragraph VII of the Third Cause of Action are untrue except it is true that on

March 12, 1956, water escaped from said pipe, all as more particularly set forth in paragraph 12 hereof.

26. It is true that at all times mentioned in the Second Amended Complaint the Board of Harbor Commissioners of the City of Los Angeles was the duly constituted authority having jurisdiction, superintendence and control, under the provisions of the Charter of said City, of the Harbor Department, a branch of the government of said City, and the shed and pipe lines in and about Berth 59 at Los Angeles Harbor.

27. In view of the Findings heretofore made, the Court abstains from making any findings concerning the allegations contained in paragraphs IV, V or VI of the City's Second Separate and Distinct Answer and Defense to the Amended Complaint, in paragraphs [100] II and III of the City's Third Separate and Distinct Answer and Defense of the Amended Complaint, in paragraph II of the Fourth Separate and Distinct Answer and Defense of the City to the Amended Complaint, in paragraph II of the Fifth Separate and Distinct Defense and Answer of the City to the Amended Complaint, in paragraph II of the Sixth Separate and Distinct Defense and Answer of the City to the Amended Complaint, or in paragraph II of the Seventh Separate and Distinct Defense and Answer of the City to the Amended Complaint except to the extent that the Court has heretofore found that the City had no prior knowledge or notice of any de-

fective or dangerous condition in said water pipe. It is true that the City had no opportunity for a reasonable time or any time after acquiring notice or knowledge or receiving notice to remedy any condition existing in said water pipe or to take any action reasonably necessary to protect plaintiff against said condition after acquiring notice thereof.

28. All findings of fact hereinafter set forth under the heading "Conclusions of Law" are hereby incorporated in these Findings of Fact the same as if herein set forth in full.

Conclusions of Law

From the foregoing facts the Court concludes:

1. In all respects as set forth in the foregoing Findings of Fact.

2. This Court has jurisdiction of this cause.

3. All conclusions of law appearing under the heading "Findings of Fact" are incorporated in these Conclusions of Law the same as if herein set forth in full.

4. Defendant is entitled to judgment that plaintiff take nothing by this action as against it.

5. That judgment be entered accordingly. [101]

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed:

That plaintiff take nothing by reason of its Second Amended Complaint herein, or any count hereof, and that defendant City of Los Angeles recover its costs herein incurred, which costs are hereby taxed in the sum of \$20.00.

The Clerk is ordered to enter this judgment forthwith.

Dated: December 3rd, 1958.

/s/ HARRY C. WESTOVER,
United States District Judge.

Lodged: November 28, 1958.

[Endorsed]: Filed and entered December 3, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL
TO NINTH CIRCUIT COURT OF APPEAL
(Rule 73(b))

Notice Is Hereby Given that Grace & Co. (Pacific Coast), plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 3, 1958.

McCUTCHEN, BLACK,
HARNAGEL & SHEA,
PHILIP K. VERLEGER,

HOWARD J. PRIVETT;

By /s/ PHILIP K. VERLEGER,
Attorneys for Grace & Co.
(Pacific Coast).

Affidavit of service by mail attached.

[Endorsed]: Filed December 18, 1958. [104]

In the United States District Court, Southern
District of California, Central Division
Civil No. 20624-HW

GRACE & CO. (Pacific Coast), a Corporation,
Plaintiff,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation, et al.,

Defendants.

Honorable Harry C. Westover, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

Tuesday, October 7, 1958

Appearances:

For the Plaintiff:

McCUTCHEN, BLACK, HARNAGEL &
SHEA, by

PHILIP K. VERLEGER, Esq., and
HOWARD J. PRIVETT, Esq.

For the Defendant City of Los Angeles:
ROGER ARNEBERGH,
City Attorney, by
C. N. PERKINS,
Deputy,
W. C. FOSTER,
Deputy, and
TRIPPET, YOAKUM, STEARNS &
BALLANTYNE, by
F. B. YOAKUM, JR., Esq.,
Of Counsel.

For the Defendant Uniharbor Corporation:
OVERTON, LYMAN & PRINCE, by
DAN BRENNAN, Esq.

For the Defendant Grace Line:
LILLICK, GEARY & McHOSE, by
L. ROBERT WOOD, Esq. [106]

The Clerk: Case No. 20624-HW Civil, Grace & Co. vs. The City of Los Angeles, et al., and also a third party complaint, Uniharbor Corporation vs. the Grace Line.

Appearing for the plaintiff Grace & Co., Mr. Philip K. Verleger and Mr. Howard Privett.

Appearing for the City of Los Angeles, Mr. C. N. Perkins, Mr. Frank Yoakum, and Mr. W. C. Foster.

Appearing for the Uniharbor Corporation, Mr. Dan Brennan.

Appearing for the Grace Line, L. Robert Wood.
All parties are present, your Honor.

Mr. Verleger: Ready for the plaintiff, your Honor.

Mr. Yoakum: Ready for the City, your Honor.

Mr. Wood: Ready for defendant Grace Line, your Honor.

Mr. Brennan: Ready.

The Court: You may proceed. I might say I have read and gone over your memorandum of points and authorities and I have read many of the cases. If you think it is necessary to make a statement, you may do so. I think I probably understand the issues involved.

Mr. Verleger: Your Honor, I think I would [4*] wish only to make a very brief observation or two simply for the purpose of physical orientation. We have prepared and the witnesses will refer to a sketch here.

The Clerk: Which has been marked Plaintiff's Exhibit 1 for identification.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 1 for identification.)

Mr. Verleger: There are references in the briefs which have been filed to Berth 60, Berth 59 and Berth 58. Those appear on the sketch here, Berth 60 starting at the outboard end of the whole dock area, berth 59 in, and Berth 58. The area up above marked as the channel is the harbor and its waters and the area at the end is water.

There are references again to certain pipes and those are indicated in the area below Berth 59.

*Page numbering appearing at top of page of original Reporter's transcript of Record.

There are references in the briefs to Signal Street. That is the area between these squares marked as buildings here, and again when one passes to the other side, there is water on the other side. 22nd Street is down here.

I think with that, your Honor, we are prepared to go ahead and start. I don't know whether counsel desires to make an opening statement.

Mr. Yoakum: Your Honor please, we have marked for identification here what I would refer to as an orientation map of the entire area there. It is not in detail like that, [5] but I think it might well be put up on the board at this time.

The Court: You can do so if you can find a place to put it. You might turn the board around.

The Clerk: The map to which Mr. Yoakum refers has been marked for identification as Defendants' Exhibit A.

(The exhibit referred to was marked as Defendants' Exhibit A for identification.)

Mr. Verleger: If no one else desires to make a statement, we will start.

The Court: You may call your first witness.

Mr. Verleger: As our first witness and as an adverse witness and employee of Outer Harbor and Dock Company, I want to call Mr. Sebastian Miretti.

The Clerk: Subject to Rule 43(b), Mr. Verleger?

Mr. Verleger: Yes.

Mr. Yoakum: The defendant City of Los Angeles objects to the witness being called as an adverse witness as far as its position is concerned.

The Court: Overruled. [6]

SEBASTIAN MIRETTI

called as a witness by and on behalf of the plaintiff, under Rule 43(b), having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Sebastian Miretti.

The Clerk: And how do you spell your last name?

The Witness: M-i-r-e-t-t-i.

Direct Examination

By Mr. Verleger:

Q. Mr. Miretti, by whom are you employed?

A. Outer Harbor Dock and Wharf.

Q. For how long have you been employed by Outer Harbor Dock and Wharf?

A. It is going on to 10 years.

Q. Were you an employee of Outer Harbor Dock and Wharf on the morning of March 12, 1956?

A. Yes, sir.

Q. Will you tell us at about what time you came to work that day?

A. Well, it was just a few minutes before 6:00. What I mean by a few minutes is possibly 10 minutes.

Q. Can you tell us where you worked at that time?

A. At 10 minutes of 6:00 I go to Berth 53. [7]

Q. Let me step back a little bit. Generally, during that period of time, did you work at the Berths 60, 59 and this area over here, Berths 60, 59 and 58?

(Testimony of Sebastian Miretti.)

A. You mean the morning of March 12th?

Q. Generally, have you worked there through the last few years for Outer Harbor Dock and Wharf?

A. Yes, all over the place.

Q. Can you tell us what you did on the morning of March 12th?

A. The morning of March 12th I——

The Court: Just a minute. For the record, this is March 12th of what year?

The Witness: 1956. I rode to Berth 53. It is a routine that I do every morning. I make out the time cards for the day before. When I drove up there, there were two Customs Officers waiting for my arrival, as they know that each morning I usually drive up there. They had notified me of a water leak over on Berth 59.

Q. (By Mr. Verleger): Did Outer Harbor Dock and Wharf Company carry on terminal operations in Berth 59 at that time?

A. Yes, they did.

Q. Then after you talked to these Customs men, what did you do?

A. I got back in my car and drove to [8] Berth 59.

Q. What did you see?

A. I saw water pouring out of the low line doors.

The Clerk: I have marked for identification, your Honor, at this time Plaintiff's Exhibits 2 to 16, inclusive.

(The exhibits referred to were marked Plaintiff's Exhibits 2 to 16 for identification.)

(Testimony of Sebastian Miretti.)

(Mr. Verleger showing documents to counsel.)

Q. (By Mr. Verleger): I am going to show you Plaintiff's Exhibit 4 marked for identification and ask you whether you can tell us whether or not that is one of the areas you saw water coming out of.

A. Yes, it is.

Q. And is this door marked 17 here what you mean by one of the low line doors?

A. That is correct. That would be the east side.

Q. What did you do following the time when you made this observation?

A. Well, we have a small door there, Door 17, and I opened it, hoping to get to the telephone, we have a telephone inside, but the water was too deep, so I got back in my car and drove back to Berth 53, and called the fire department from there.

Q. Where was it, in what building was it that you saw this water that was too deep to go [9] through? A. In Berth 59.

Q. Can you describe for us very briefly what Berth 59 is? A. Yes. It is a transit shed.

Q. It is a building, is it not, that is approximately 100 feet wide and approximately 600 feet long? A. Correct.

Q. Was there water generally over the floor of that building? A. Yes, there was.

Q. At that time was the floor of that building entirely flat?

A. Well, I wouldn't say entirely flat. There were some low spots in it.

(Testimony of Sebastian Miretti.)

Q. Was it sunk in more in any particular part than any other?

A. Yes, about the center of the shed.

Q. The center of the shed was sunk in deeper than the rest, is that right? A. Yes.

Q. And the water was deeper in that part, I take it? A. Right.

Q. Do you have any idea how deep the water was generally?

A. I would say four to six inches in various [10] spots.

Q. Now, further than that, is this structure, Berth 60, 59 and 58, all essentially one building?

A. Yes, it is one building except for your fire walls in between.

Q. There are fire walls in between but otherwise it is all one structure, is that right?

A. Correct.

Q. What did you do after you observed this water in there?

A. I went back to Berth 53 and called the Fire Department.

Q. You called the Fire Department?

A. Yes, sir.

Q. Did you call anyone else?

A. Well, after I had driven back to Berth 59, I again went back to Berth 53 and called Mr. Berry.

Q. After you did those things, did anyone appear and do anything about this water?

A. Yes. The Fire Department was there, and also the Harbor Department.

(Testimony of Sebastian Miretti.)

Q. Some time later was the water turned off?

A. Yes, it was.

Q. Do you recollect about how long it took?

A. I would say approximately 45 minutes from the time I called. [11]

Q. Do you know where that water was turned off, where they turned it off? A. Yes, I do.

Q. Where did they turn the water off?

A. It would be what we call in between Berth 59 and 60, down at the bottom of the ramp.

Q. Could you tell where the water was coming from when you looked at all this water——

The Court: Just a minute. May I interrupt?

Mr. Verleger: Sure.

The Court: You say you got there about 10 minutes to 6:00 in the morning?

The Witness: Yes, sir.

The Court: Do you know what time it was when you first called the Fire Department?

The Witness: I would say it was about 6:00 o'clock, your Honor.

The Court: About 6:00 o'clock?

The Witness: Yes.

The Court: Then you say the Fire Department did not get there until about 45 minutes later?

The Witness: No. That's the time the water was turned off.

The Court: When did the Fire Department arrive, then? [12]

The Witness: Well, they arrived immediately

(Testimony of Sebastian Miretti.)

A. Correct.

Q. During this period have you noticed that various areas in the floor of the three buildings there had settled from time to time? A. Yes.

Q. So far as you know, during that period had any of the dirt under the dock there been washed out by the action of the bay?

A. No, I don't know. I couldn't say yes to that.

Q. One further question. During the period you worked there—well, there is within that large structure a sprinkler system, is that right? [15]

A. Yes, there is.

Q. And there are also a number of small fire lines around the inside of the building, that is, fire hoses, is that right?

A. Yes, there is, every 50 feet.

Q. Have you ever known a longshoreman to shoot water around the place from the fire hose?

A. No. It would be impossible, because if you turn the water on, your alarm goes off.

Mr. Yoakum: I move to strike everything after the answer, "No, sir," as a conclusion of the witness.

The Court: Denied.

Q. (By Mr. Verleger): During the period you have worked there, have you ever seen water come out from either the sprinkler system or the hoses while you were around there?

A. No, I never have.

Q. So that there is no water from that system that has come out that has been released onto the surface in your experience, is that right?

(Testimony of Sebastian Miretti.)

A. No, sir. That is correct.

Mr. Verleger: No further questions of this witness.

The Court: May I ask another question?

Mr. Verleger: Yes. [16]

The Court: During the nine years you worked in this locality, did you ever notice any of the pipe leaking?

The Witness: No, I haven't, your Honor.

The Court: You didn't see any escaping water from anywhere?

The Witness: I never have seen escaping water.

The Court: All right.

The Witness: Except the morning of March 12th.

The Clerk: At this time, your Honor, there have been marked for identification Plaintiff's Exhibits 17 to 20, inclusive, and also the City of Los Angeles Exhibits B to F, inclusive.

(The exhibits referred to were marked as Plaintiff's Exhibits 17, 18, 19 and 20 for identification.)

(The exhibits referred to were marked Defendant City of Los Angeles Exhibits B, C, D, E and F for identification.)

Mr. Verleger: I do have a couple of further questions, your Honor, that I forgot. May I go ahead?

The Court: Yes.

Mr. Yoakum: If the court please, is it proper

(Testimony of Sebastian Miretti.)

when counsel is interrogating over a document to go up there with counsel?

The Court: Oh, yes.

Q. (By Mr. Verleger): After the water had been turned off, a little later on [17] did part of the floor in Berth 59 fall in? A. Yes, it did.

Q. I have a number of pictures here that show what the place looked like at various times. Could you look at each one of them and tell me whether this is—first, I refer you to Plaintiff's Exhibit 14. Does that appear to you to be a picture of the interior of Berth 59 during part of that day?

A. Yes, it is.

The Court: What was the number of that?

The Witness: 14.

Q. (By Mr. Verleger): Next I refer to you a picture, Exhibit 9. Does that also appear to be a picture of the place?

A. Yes. That is Berth 59.

Q. One further question. At the time you saw the building was there more water or less than appears in these pictures?

A. There was more water.

Q. In other words, at the time these were taken, there was less, some of the water had been mopped up?

A. Yes, because you have pumps here pumping it up.

Q. Next I refer you to a picture which is Exhibit No. 8. Does that show again part of Berth 59 in

(Testimony of Sebastian Miretti.)

the condition it was after this water had arrived there? A. Yes, it is.

Q. In order to speed this up a little, I will [18] refer to Exhibits Nos. 5, 6 and 7. Are they likewise such pictures?

A. Yes, sir. That is all Berth 59.

Q. There is a picture here, which is Exhibit No. 16, and that is also Berth 59? A. Yes.

Q. That is looking a long ways down the building, is it not? A. Yes.

Q. Here we have Exhibits 12 and 11. These show holes in the floor of the building.

A. Correct. That is when it caved in.

Q. Did it cave in immediately or a little later?

A. How do you mean "immediately"?

Q. I mean was it caved in as soon as the water was cleaned up, or did the floor actually fall in a little bit later? A. It fell in a little bit later.

Q. Do you happen to remember about what time it fell in?

A. Roughly guessing, I would say around 9:30.

Mr. Yoakum: If it is a guess, I move to strike it as not proper.

The Court: Denied.

Q. (By Mr. Verleger): Finally, we have four here, which are numbered 15, [19] 2, 3 and 10. Do these also show the hole which developed in the floor in Berth 59? A. Yes, this is the hole.

The Court: I might say, counsel, the negligence here is not the fact that the floor collapsed, but the negligence is the allowing of the water to escape.

(Testimony of Sebastian Miretti.)

Mr. Verleger: I think that's right, your Honor. I think the only effect these pictures have is to give a picture of the whole thing which occurred.

The Court: All right.

Mr. Verleger: With that in mind, your Honor, I would like to offer these photographs in evidence at this time.

Mr. Yoakum: To which we object severally and collectively on the ground that they don't tend to establish any negligence at all on the part of the defendant. As the court remarked, it is the bursting of the pipe and the flooding that is alleged to have caused the damage. Some of these pictures were taken subsequent—all of them were taken after the event.

The Court: That is probably true. From a technical standpoint, I think you are right. However, I am going to overrule the objection. I don't think you are harmed by their coming in at all. They do give some idea of the damage that occurred. It may be helpful if we get to the question of damage. Objection overruled. [20]

The Clerk: The following exhibits have been admitted into evidence: 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15 and 16.

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15 and 16.)

Mr. Verleger: No further questions of this witness, your Honor.

The Court: Cross-examine.

(Testimony of Sebastian Miretti.)

Mr. Yoakum: What is the court's pleasure as to the order of cross-examination?

The Court: I don't care just so we can have some routine and stick to it. The clerk may have some ideas on how he can keep track of you.

The Clerk: It doesn't make any difference to me, your Honor. I can keep track of them.

The Court: But whatever sequence you establish, will you continue that throughout the trial?

Mr. Wood: I would suggest the City and then the Outer Harbor and then the Grace Line.

The Court: That is all right with me.

Cross-Examination

By Mr. Yoakum:

Q. Do I pronounce your name correctly Miretti?

A. Miretti.

Q. Pardon me if I sometimes mispronounce it. I assure you I won't do it intentionally.

A. That's all right.

Q. Where was your actual place of business down there, Mr. Miretti? You say you were a gear foreman?

A. Correct.

Q. Where did you work?

A. I worked in the Outer Harbor.

Q. I mean did you have a special location down there where you had your office?

A. Well, yes.

Q. Where was that?

A. At that time our office was at Berth 53.

Q. Where was 53 from 59?

(Testimony of Sebastian Miretti.)

A. It is right across the channel.

Q. Across the east channel or the main channel?

A. The east channel.

Q. How far would that be by driving?

A. By driving I would say it is about, oh, less than a quarter of a mile.

Q. What would be your occasions for going over to Berth 59?

A. Well, I go there to gasoline the equipment.

Q. The equipment that the Outer Harbor Company uses [22] in its stevedoring operations?

A. Correct.

Q. You say that the water was turned off between Berth 59 and Berth 60?

A. I didn't say 60 that it was turned off. I say that is where they turned the water off is between Berth 60 and 59.

Q. I wonder if you would be kind enough to indicate on this drawing marked Exhibit 1 for identification the location of this turn-off that you saw that morning. Indicate it by a pointer. Will you stand to one side, please?

A. You don't show any ramp here. Is this what——

Q. It hasn't been identified, but I take it this is Signal Street running down here between Berth 60 and what appears to be Berth 68. That is the main street.

A. If this is a street, it is right in here.

The Court: Speak up so I can hear you.

The Witness: Right in here (indicating).

(Testimony of Sebastian Miretti.)

Q. (By Mr. Yoakum): Will you please make a little mark for that? Just make a black X where you observed this turn-off.

A. (Witness complying.)

Q. Now, then, I would like to make a notation here so that may be kept permanent. The arrow will indicate the place where you say the water was turned off on the morning in question. [23]

The Court: Let's mark that M-1.

Mr. Yoakum: M-1, all right, your Honor. (Counsel marking on exhibit.)

Q. Did you call the Harbor Department?

A. I called the Fire Department.

Q. You did not call the Harbor Department?

A. No, sir.

Q. You say that the Harbor Department man arrived about the same time the Fire Department arrived?

A. To my best knowledge, yes, sir.

Q. Did you recognize the man from the Harbor Department?

A. No, I didn't recognize any certain man. I just recognized the automobiles.

Q. Did you talk to him?

A. No, sir, I didn't.

Q. Did you make any effort to turn off the water?

A. No, sir.

Q. Why didn't you try to turn it off?

A. I wouldn't have the proper tools to turn the water off.

Q. Did you watch the man turn off the water?

A. From a distance, yes, I did.

(Testimony of Sebastian Miretti.)

Q. Where were you at the time you saw him turn it off? [24]

A. I would say about Door 17 on the low line of Berth 59.

Q. Would Door 17 be approximately where I am pointing (indicating)?

A. Yes, it would be approximately right there.

Q. Would it be fair to put a cross there?

A. I think so.

Mr. Yoakum: We will call that M-2, your Honor.

The Court: All right, M-2.

Q. (By Mr. Yoakum): What is the first thing you saw this person from the Harbor Department do upon arrival?

A. The first thing, they had their boots on and waded there in the water, out there in the water, trying to find the location of this manhole where they cut the water off.

Q. Did you observe him all the time from the time of his arrival until the time that the water was turned off?

A. No, sir. About that time I went back to Berth 53 and notified Mr. Berry of the water in Berth 59.

Q. Did you move back to Berth 53 before he turned the water off?

A. No. I was still at Berth 59.

Q. What time did you leave Berth 59?

A. The second time I would say about 6:30.

Q. Let's see. The first time is when you arrived and then saw water and then you went to telephone the Fire [25] Department?

(Testimony of Sebastian Miretti.)

A. Correct. I went back to Berth 53 to telephone the Fire Department.

Q. Then your second departure was at about 6:30? A. Yes, roughly guessing.

Q. And the water had not been turned off at that time, is that your testimony?

A. At 6:30 I would say the water was being turned off. About 6:45 I think the water was completely off.

The Court: Did it take 15 minutes to turn off the water?

The Witness: It is pretty hard to find out there.

Q. (By Mr. Yoakum): Do I understand you weren't there when the water was turned off?

A. I was there when they were lowering their long-handled wrench down into the manhole.

Q. How many men were there doing this?

A. There were several men. There was the Fire Department and the Harbor Department.

Q. From what you observed, were they working all the time? A. Yes, they were.

Q. Your best judgment is that you left there the second time at about 6:30? [26]

A. Yes, I would say.

Q. Now, when did you come back again?

A. If I remember correctly, I came right back with about 50 bags of sawdust.

Q. At what time?

A. Oh, I would say about 6:35, 6:40.

Q. Was the water turned off yet?

(Testimony of Sebastian Miretti.)

A. At about 6:35 it had stopped bubbling out of the dock.

Q. It bubbled after it was turned off, didn't it?

A. Very little. There were signs that the water had been turned off.

Q. After you returned with the sawdust, how long did you stay there?

A. I stayed there quite a while.

Q. Give me, please, an estimate in time.

A. Oh, I would say until 10:30, 11:00 o'clock. But, of course, I was in and out of there all the time to get equipment for the emergency gang that we had ordered out, such as gloves, aprons, boots. You see, our main gear room is over at Berth 53.

Q. Now I am getting something clear that I didn't understand. When you say gear, you mean paraphernalia for working?

A. Equipment? [27]

Q. You don't mean gears? A. Equipment.

Q. I beg your pardon. I misunderstood that. Now, when you came back here at about 6:40 with the sawdust, did you come and go?

A. Yes, I did come and go.

Q. So you were back and forth maybe several more times? A. Yes, I was.

Q. You say you were getting paraphernalia and gear. What was that for?

A. Well, that is for the emergency gang that had been ordered out. We had to furnish them with boots, gloves and aprons.

Q. Do you know who ordered the gang out?

(Testimony of Sebastian Miretti.)

A. Mr. Gorman ordered the gangs out.

Q. Will you spell that name for me?

A. G-o-r-m-a-n.

Q. Who is Mr. Gorman?

A. He is superintendent at the Outer Harbor.

Q. Do you know how he heard of this situation?

A. Well, Mr. Gorman gets to work at about 7:00 o'clock and he heard it through me.

Q. You saw him at about 7:00 and told him there had been a break? [28]

A. Yes. Not only that, but he could see all the commotion down at Berth 59 from where he comes to work.

Q. Were you there with Mr. Gorman when he ordered the crew out?

A. No, I don't remember that I was, no.

Q. Do you know whether anybody from the Grace Company asked the crew to come in there?

A. No, I don't.

Q. As a matter of fact, didn't Mr. Gorman order the crew out on his own initiative?

The Court: Counsel, how would this witness know that?

Mr. Yoakum: He might know it from something Mr. Gorman said.

The Court: He can testify what Mr. Gorman did, but I don't think he can testify what Mr. Gorman was thinking. Then there is another matter. I think the issue before the court at this time is whether there is any negligence on the part of the City relative to allowing the pipeline to deteriorate and

(Testimony of Sebastian Miretti.)

to burst. It seems to me that anything that happened after that is rather immaterial unless it throws some light upon the question of damage. We are not concerned with damage at this particular time.

Mr. Yoakum: Well, it may have something to do with liability, your Honor. In this case the Outer Harbor [29] Company—everybody seems to be suing everybody else here. As you have observed, the Outer Harbor is suing the City of Los Angeles because Outer Harbor didn't get paid for some stevedoring operation they claim we owe them.

The Court: Is that what you are trying to go into now, the question of whether or not there is any liability to pay for this mopping up operation?

Mr. Yoakum: Yes.

The Court: Of course, you are clear outside the direct examination, because there was no testimony on this line at all on direct examination. Of course, there hasn't been an objection and it may come in. I suppose it might as well come in now as later.

Mr. Yoakum: That is what I thought. If no one had any objection, maybe we can cover this now.

The Court: All right. You proceed.

Mr. Yoakum: Mr. Brennan, counsel for Outer Harbor, is willing to make a stipulation that his company ordered the longshoremen out on its own initiative, without the request of anyone.

Mr. Brennan: We are prepared to so stipulate, your Honor.

The Court: Such may be the stipulation.

Q. (By Mr. Yoakum): Now, Mr. Miretti, did

(Testimony of Sebastian Miretti.)

you supervise the operation [30] that took place within a transit shed after your crew or gang got there? A. No.

Q. You were in and out frequently, though?

A. Yes, sir.

Q. And you observed what they were doing?

A. Yes.

Q. Can you just tell us briefly what they did?

A. Are you speaking of the stevedore gangs?

Q. I am speaking of the crew that the Outer Harbor ordered out to meet this situation.

A. Yes.

Q. Is it correct to call them stevedores?

A. Yes. I got the lift jitneys.

Q. Sir?

A. I call them lift jitneys, that is the motorized equipment with blades on it that picks up things.

Q. Is that something like a fork lift?

A. Yes. I'm sorry. I should have said fork lifts, and the pallet boards that go with it. Then they had these fork lift drivers, and the dock gangs would take the dry cargo and put it on one board and the wet cargo on another, and drive it into a dry spot.

Q. How many of these fork lifts were used in that operation? [31]. A. I had three there.

Q. Were there any more?

A. I had plenty more outside.

Q. I mean were only three used?

A. If I remember rightly, I think there were three gangs ordered out.

(Testimony of Sebastian Miretti.)

Q. What did one of these things weigh?

A. They weigh from 7,900 to 10,000 pounds.

Q. Over what area in Shed 59 did these lifts operate during this period right after the emergency?

Where are those pictures?

The Clerk: They are all in there.

Mr. Yoakum: Well, let's withdraw that question and I will get at it in a little different way.

Q. I am showing you now No. 16, which is that long view of the shed. Now, these bags we see in the foreground, are they in Shed 59?

A. Yes, that is Shed 59.

Q. Is that the way they were before you started moving them?

The Court: May I inquire, is that the coffee bags in question?

The Witness: Yes, these are the coffee bags.

Mr. Yoakum: I don't know whether they are the ones in question. [32]

The Court: If it is not the coffee bags, then it is immaterial what happened to the other merchandise.

Mr. Yoakum: Well, your Honor, I think that the court has it clearly in mind, but counsel for plaintiff apparently seems to make some contention that there was some dereliction on the part of the City because this floor caved in in there.

The Court: Counsel may be able to show the building was negligently constructed, but the mov-

(Testimony of Sebastian Miretti.)

ing of the bags certainly doesn't indicate it was or was not negligently constructed.

Mr. Yoakum: What they did may indicate what caused something to happen there, though.

The Court: May I inquire, how much is involved in this stevedoring transaction?

Mr. Yoakum: You mean money?

The Court: The amount of money involved. How much is the Outer Harbor trying to get back?

Mr. Brennan: I think it is a total of around \$5,000. The amount in this action is considerably less.

The Court: I mean in this action. How much are you asking for in this action?

Mr. Verleger: I think it is \$1,250. I'm sorry. The total counterclaim against the City of Los Angeles for Uniharbor seems to be \$3,553.92, of which \$1,213 seems to be moving expense. [33]

The Court: That's all right. \$3,000. Now, I don't know, Mr. Plaintiff. Your claim of negligence is based on the fact that the City allowed these pipes to remain in the ground for such a long period of time that they deteriorated and burst. Is there any other claim of negligence of any kind?

Mr. Verleger: Your Honor, all of our claims relate to that one thing. The question of meter readings—I think the floor and things of that sort, but, basically, that is our claim.

The Court: You are not claiming any negligence, as far as I know, because of the fact that

(Testimony of Sebastian Miretti.)

the bags of coffee weren't moved properly or weren't handled properly or weren't dried out, they didn't use enough men, or anything like that. You aren't claiming that.

Mr. Verleger: No. I think we may have a feeling in view of the ancientness of the pipe, the City should have had someone ready to turn the water off just a little bit quicker, but the main claim, when you come down to it, your Honor, is that the pipe——

The Court: Maybe they should have had a guard down there night and day with searchlights. I don't know.

Mr. Verleger: If they didn't want to replace the pipe, your Honor, I think they ought to take some precautions [34] accordingly, but the main claim is the pipe shouldn't have been allowed to break.

The Court: I allowed these pictures to come in. I thought they were immaterial and I still think so, but I allowed them to come in, but if you are going into extensive cross-examination I think I will reverse myself and keep them out, because I don't think they have a thing in the world to do with the question of negligence. I don't think the plaintiff is concerned with them. It may be that the City and the Outer Dock has some concern or maybe the City will claim \$3,000 was too much to pay for this kind of work. I don't know.

(Testimony of Sebastian Miretti.)

Mr. Brennan: I didn't know we were going to get into that issue.

The Court: I didn't know we were, either.

Mr. Yoakum: The plaintiff introduced the photos for some reason which I presume he thinks helps his case.

Mr. Verleger: Your Honor, sometimes in a lawsuit I think it helps to just have a picture of what happened. That's all I have in mind with the pictures.

The Court: Well, I don't think the pictures have anything to do with the question of liability in this case. They show the situation that existed in the inside of the shed after the water had been allowed to escape and probably after it was turned off. [35]

Mr. Verleger: I think they may have this much further materiality, your Honor, that is, that they give a picture of the use to which the property was put, which I think is material on the duty and care, but I think there is no real question about what the property was used for anyway, so that if the pictures are going to extend the trial too much, I am perfectly prepared to stipulate they be withdrawn.

Mr. Yoakum: I wanted to suggest a stipulation in order to eliminate further questions about the pictures, a disclaimer of any negligence on the part of the City with reference to the soil under that transit shed. I am not talking about the main-

(Testimony of Sebastian Miretti.)

tenance of the pipe, because that wasn't under the transit shed.

The Court: I know, but the pictures don't show anything about the soil underneath the shed. The pictures show that the soil gave way and the floor collapsed. What caused that floor to collapse, I don't know.

Mr. Yoakum: That is what we are going to show.

The Court: This witness certainly couldn't testify to it.

Mr. Yoakum: He can testify as to 10,000-pound lifts running around over that floor with knowledge that there had been a big flood. If I am allowed to develop it, you will see what caused the floor to collapse.

The Court: Is there an objection? Well, I [36] will make an objection. If counsel doesn't want to object, I will. I think it is immaterial.

Mr. Yoakum: I will make an offer to prove by this witness, if he is permitted to answer this line of interrogation, that he would testify that these fork lifts were running all over the floor of that shed and into the very area where the floor eventually gave way, that they had knowledge of the fact that there had been water running for some time, large quantities of it, and notwithstanding that, they continued to use these heavy pieces of equipment over this floor, and that they were admonished to stop running the equipment over the area where it collapsed.

(Testimony of Sebastian Miretti.)

The Witness: There is a correction there. In your picture it shows some fences that I brought out there to keep the equipment off the cracked floor.

The Court: Just a minute. I'm sorry, but you can't object to what counsel say. Counsel might object to what you say, but you can't object. Not only that, but is anybody suing anybody because they allowed the equipment to go upon the floor and the floor collapsed?

Mr. Yoakum: The plaintiff is apparently suing us because the floor collapsed.

The Court: I don't think so at all. The plaintiff isn't suing you for that. The plaintiff is suing you because somebody allowed the water to [37] escape.

Mr. Yoakum: I wish he would say it with that kind of frankness.

The Court: I will say it for him, if he doesn't say it. I think that is the issue. I don't think this line of questioning has a thing in the world to do with the issues before the court.

Mr. Yoakum: Very well. Nothing further.

Mr. Brennan: We have no questions.

Mr. Perkins: Are the photographs withdrawn from evidence?

The Court: No, they haven't been withdrawn, but counsel has made a motion. I see no objection to them staying in or to their being withdrawn. If you want them out, I will take them out.

Mr. Yoakum: I think they ought to go out.

The Court: All right. I will reverse myself and

(Testimony of Sebastian Miretti.)

sustain the objection. The exhibits from 2 to 16 are out.

The Clerk: 13 is missing, so it is 2 to 12 and 14 to 16.

The Court: Yes, that's right, 13 hasn't been offered yet.

(The exhibits referred to, Plaintiff's Exhibits 2 to 12 and 14 to 16 were withdrawn.)

Mr. Yoakum: 13 hasn't been offered?

Mr. Verleger: That's right. [38]

The Court: Well, it's nearly 11:00 o'clock. Ordinarily we are very prompt in this court about taking recesses and about beginning on time. We usually take a recess at 11:00 o'clock of 10 or 15 minutes and quit promptly at 12:00, unless there is some urgency, and we won't resume until 2:00 o'clock in the afternoon. Unless there is some urgency, we usually quit at 4:00 in the afternoon. I do that because I know we have busy counsel here and they have other matters in their office, they have other business they want to take care of, and maybe if you can get away at 4:00 o'clock you can still go down and do some other business.

Court will now stand in recess until five minutes after 11:00.

(Recess.)

The Clerk: All parties are present, sir.

Mr. Wood: If the court please, I have the last. None of us cares to ask any questions.

Mr. Verleger: No redirect.

The Court: May this witness be excused?

Mr. Verleger: He may be excused as far as I am concerned.

Mr. Brennan: We will make him available any time during the trial.

Mr. Verleger: First I would like to read a few answers to interrogatories into the record. [39]

Mr. Yoakum: We may object to them on the ground that they weren't answered by a person occupying the status of one——

The Court: Will you tell me when the interrogatories were filed so that I can find that in the files? The only way I can find them is by the date.

Mr. Verleger: The answers were filed, I think, on 1-7-57.

Mr. Yoakum: 1-15-57.

Mr. Verleger: 1-15-57, that's right.

The Court: All right, 1-15. What interrogatory are you referring to?

Mr. Verleger: First I want to read in the answer to the first interrogatory, which commences on page 2, line 14.

Mr. Yoakum: Before Mr. Verleger proceeds, I would like to offer an objection on the ground that this interrogatory was not answered by a party or an officer, director, or managing agent of the party.

The Court: Why wasn't it? It was supposed to be. Where is the notice for the interrogatory? If it wasn't answered by the right party, whose fault is it? Is it the plaintiff's fault?

Mr. Yoakum: The party answered it who had the best available source of information, your Honor, for those [40] questions. The managing agent was available and they took his deposition.

The Court: Let's have the original interrogatories. When were they filed?

Mr. Yoakum: We received them on November 27, 1956, your Honor.

The Court: I have here Interrogatories Propounded to Defendant by Plaintiff, November 4, 1956.

"To the City of Los Angeles, Defendant:

"Pursuant to Rule 33 of the Federal Rules of Civil Procedure, the plaintiff requests that the following interrogatories be answered under oath by any of your officers competent to testify in your behalf who knows the facts about which inquiry is made and the answers be served upon plaintiff within 15 days from the time these interrogatories are served on you:"

Now, you have given them to the wrong man and you object to it? Can you give them to the wrong man to make the answer and then object?

Mr. Yoakum: We gave them to the man that had the information or the sources of it. The other man couldn't have answered them, we don't think.

The Court: The objection is overruled. Read the interrogatory and the answer both.

Mr. Verleger: "Interrogatory No. 1. [41]

"(a) State whether or not the City of Los Angeles owned Berth 59, Pier 1, Los Angeles Harbor * * *"

There is no dispute the City owned Berth 59, I take it, counsel, is that correct?

The Court: If you want to read the interrogatories, read the interrogatory and then read the answer. Go ahead in the proper way and keep the record straight.

Mr. Verleger: All right.

“State whether or not the City of Los Angeles owned Berth 59, Pier 1, Los Angeles Harbor, together with the buildings situate at said Berth 59, on or about March 12, 1956.”

The answer to that is:

“(a) Yes, the City of Los Angeles owned Berth 59, Pier 1, at Los Angeles Harbor, together with the buildings situate at said Berth 59, on or about March 12, 1956.”

“(b) State whether or not the City of Los Angeles maintained and kept in repair the facility of said Berth 59, including any and all water piping beneath said Berth 59, on or about March 12, 1956.”

The answer is:

“Yes, the City of Los Angeles maintained and kept in repair the facility of said Berth 59, including any and all water piping beneath said Berth 59, on or about March 12, 1956, at such times and in such places as it became [42] aware that such maintenance work was necessary in order to keep said water piping in good operating condition; such maintenance does not include digging up paving in order to inspect underground piping beneath buildings in order to determine the condition of water piping located thereat unless water is found above

ground, indicating evidence of a possible leak in the piping installed below ground.”

The next part of the interrogatory is:

“(c) If any person other than the City of Los Angeles maintained said berth, including said water piping, on or about March 12, 1956, state who said person was, what the work done by said person was, and whether or not said work was done under contract with the City of Los Angeles.”

The answer is:

“No person, firm or corporation other than the City of Los Angeles maintained said berth, including said water piping, on or about March 12, 1956.”

The next Interrogatory No. II.

“(a) State whether or not the warehouse or shed upon said Berth 59, including the foundation and the substructure of the same, was erected by the City of Los Angeles.”

The answer is:

“The transit shed located at said Berth 59, including the foundation and the substructure of the same, was erected by the Harbor Department of the City of Los Angeles.” [43]

“(b) If the said structure was erected by any other person under contract to the City of Los Angeles, state who said person is.”

The answer to that is:

“(b) The transit shed at Berth 59, including the foundation and substructure of the same, was erected by the City of Los Angeles; certain parts of the construction work were performed by subcontractors, such as the paving on the wharf by Griffith

and Company; the material for the exterior walls of the transit shed by Johns-Manville Company; the wharf and shed footings, including the bulkhead, anchors, riprap, and foundation were erected by Snare and Tviest, contractors; steel work was erected by Llewellyn Iron Works, contractors. No records are available indicating the identity of the contractors who made the earth fill or who poured the concrete floor slab. The original flooring in the transit shed was of timber construction, which was replaced with a concrete floor slab poured in black iron mesh, laid on top of a compacted earth fill.”

The next I have is for III(a), and the question is——

Mr. Yoakum: You skipped some.

Mr. Verleger: I am not offering all of this, if the court please.

The Court: Do you want the rest of that interrogatory? [44]

Mr. Yoakum: I think it ought to be in.

The Court: Read the rest of the interrogatory.

Mr. Verleger: All right.

“(c) State whether or not the City of Los Angeles has in its possession the plans or blueprints of said Berth 59, including:

“1. Plans of the foundation and substructure of said Berth 59, including specifications as to fill, if any; and

“2. Plans of any and all piping beneath said Berth 59.”

The answer is:

“Plans of the foundation and substructure of

said Berth 59, numbered 1263 and 1170-B, are available and blueprints of the same will be supplied upon request.

“2. Plans of piping beneath the transit shed at Berth 59, including plans of the sprinkler system supplying said shed, numbered 6211 and 1340, are available and will be supplied upon request.”

Now we get to III(a).

“State when said Berth 59 was originally constructed.”

The answer to that is:

“Berth 59 was originally constructed during or about the year 1914. [45]

“(b) State whether or not any alterations have since been made in said Berth 59, including alterations as to the foundation and the piping beneath said Berth 59.”

The answer is:

“(b) No alterations have been made in said Berth 59 to the foundation or the piping beneath said berth since the transit shed located thereon was first constructed, except as noted in II(b).”

(c) State whether the City of Los Angeles has plans and blueprints for any and all such changes.”

And the answer:

“(c) No plans or blueprints of any changes are in the possession of the City of Los Angeles, nor are any plans available for the concrete slab floor.”

“Interrogatory No. IV.

“(a) (1) State whether or not the floor of the warehouse of said Berth 59 consists of concrete without reinforcing, and approximately 6 inches thick.”

And the answer is:

“The floor of the transit shed at said Berth 59 consists of concrete reinforced with standard black iron mesh, and said floor is approximately six inches thick.”

“(2) If the floor is otherwise constructed, describe said construction.”

“(2) The floor was not otherwise constructed as of [46] March 12, 1956, except for minor repairs made with bitumastic concrete.”

“(3) State for what loading, including ‘live’ and ‘dead’ loads, the floor was designed.”

The answer is:

“The floor was designed for 400 pounds per square foot loading, including both ‘live’ and ‘dead’ loads.

“(b) State whether or not said floor slab is supported by a compacted dirt fill contained between a retaining wall on the water side of said berth and a retaining wall on the landward side.”

“(b) Said floor slab is supported by a compacted dirt fill to a depth of four to five feet contained between a concrete sheet pile bulkhead wall on the water side of said berth and a standard concrete retaining wall on the land side.”

“(c) State from where the dirt which was used for any fill beneath the floor of said Berth 59 was obtained.”

The answer is:

“(c) The original source of this dirt fill is unknown and is not designated in Harbor Department records.”

Your Honor, there are a number of these where there are only short portions that I am interested in and if we are going to——

The Court: I think if you read any part of an interrogatory, [47] you ought to read it all.

Mr. Verleger: Very well, your Honor.

Interrogatory V is:

“State whether or not on or about March 12, 1956, a quantity of water escaped from a water pipe beneath said Berth 59.”

The answer is:

“Yes, water was reported to Harbor Department representatives leaking beneath the platform on the land side of the shed, at or about 6:00 a.m., March 12, 1956, and the water pipe beneath the transit shed was shut off at or about 6:45 a.m.”

“(b) State whether or not said water reached the surface of the floor, and damaged commodities then in the shed at said Berth 59.”

The answer is:

“(b) Yes, at the time Harbor Department maintenance men arrived at the shed, water had reached the surface of the floor and had wet commodities then in the shed at said Berth 59.”

“(c) State fully how, so far as the City knows, said water escaped from said pipe.”

The answer is:

“(c) The pipe beneath the loading platform on the land side under paving and approximately eight or nine feet [48] below the level of the transit shed floor and outside the shed burst and water escaped therefrom.”

“(d) State fully in what manner the water from said pipe reached the surface of said floor.”

The answer is:

“(d) The water was forced up through the dirt fill under the loading dock floor and apparently through an opening between the loading dock floor and the transit shed foundation inside the building, some of the water flowing out over the top of the loading dock into the street and some of the water flowing down into the center of the transit shed floor.”

“(e) State whether or not a portion of the floor of said shed collapsed following the escape of said water.”

The answer is:

“(e) Yes, an area approximately 20 by 40 feet of the shed floor collapsed.”

“(f) State in what manner the escape of said water brought about the failure of said floor.”

The answer is:

“(f) The water undermined the dirt fill, and after the water had been shut off and some time had elapsed, the surface of the floor collapsed and dropped approximately four to six feet, apparently due to the weight of cargo and traffic over it.” [49]

“(g) State the degree, if any, to which said pipe was corroded at the time of failure.”

“The hole through which water escaped from the pipe covered an area about as big as an average man’s hand.

“(h) State the material of which said pipe was made, the method of manufacture, the thickness of

its wall at the time of manufacture, the place of manufacture, and the date of installation.”

“Said pipe was standard cast iron bell and spigot, eight-inch water pipe, thickness of wall approximately 9/16”, place of manufacture unknown, installed about the year 1914.”

“(i) State the depth of the top of the said pipe below the top of the floor of said berth.”

“(i) The pipe was installed approximately seven to eight feet below the surface of the floor of said berth.”

The next interrogatory, your Honor, is No. VIII.

Mr. Yoakum: Are you omitting No. VI?

Mr. Verleger: That’s right, VI and VII.

“Interrogatory No. VIII.

“(a) Describe fully any method, plan, or system of maintenance, inspection, and repair which the City had in effect as respects said pipe, prior to the escape of said water from said pipe. Give names of all persons inspecting.” [50]

“(a) No inspection of the underground piping was made until some trouble was reported or some evidence of leakage developed, in view of the fact that this particular pipe was installed some eight feet below the surface of a concrete slab floor in use and it was impractical to break through the same.”

“(VIII-b) If any reports were made incident to said inspection, give the dates of said reports, and the persons to whom said reports were made.”

“(b) There was no underground inspection made of the piping in this transit shed, and no re-

ports were made except where evidence of leakage occurred."

The next is interrogatory IX.

"(a) State the uses to which the water in said pipe are put."

"(a) Fire prevention only. This pipe provided water to the sprinkler system in the transit shed only."

"(b) State the static head of water in said pipe in feet or in pounds per square inch when there was no flow of water in said pipe."

"(b) The static head of water in said pipe was the normal Los Angeles Water Department pressure in said area, which was approximately 65 pounds per square inch."

"(c) State the maximum internal pressure to which said pipe might at any time have been subjected, including [51] pressure of water hammer."

"(c) The maximum internal pressure to which said pipe would be subjected at any time would be the normal Los Angeles Water Department pressure; the shutoff valves in the system were slow moving, hand operated valves, and the air entrained in the system would have prevented any water hammer effect from occurring."

"(d) State whether or not the water from said pipe was being drawn at any point within the 24 hours prior to failure of said pipe."

"(d) No water was drawn at any point from said system within 24 hours prior to the occurrence of March 12, 1956, as far as is known."

"(e) State whether or not the flow of water in

said pipe was shut off at any time in the 24 hours of said failure, giving the time and occasion of said shutoff."

"(e) The flow of water in said pipe was not shut off at any time within 24 hours prior to the occurrence of March 12, 1956, as far as is known, with the exception of the shutoff which occurred at or about 6:45 a.m., March 12, 1956, after the leakage complained of."

"(f) State the maximum rate of flow of water in said pipe at any time in gallons or cubic feet per minute."

"(f) Under a pressure of 65 pounds per square inch, the rate of flow is approximately 20,000 gallons per [52] minute."

The next is Interrogatory No. X.

"(a) State what, if any, methods were used to ascertain at any time whether or not there was leakage from said pipe."

"(a) None, previous to the break. An inspection would only be made where surface water was apparent."

Interrogatory No. XI.

"(a) State what disposition was made of the section of pipe referred to following removal of such damaged section, if any, from said shed."

"(a) The pipe referred to was removed to the Harbor Department Supply Yard, Berth 161, where photographs were taken, and the pipe is now retained for further reference at the same location. Prints of the photographs are available upon request."

“(b) State whether said damaged section of pipe was marked in any way.”

“(b) The section of the damaged pipe was marked with crayon at the time it was cut out, for reference only.”

“(c) State where said damaged section of pipe is being kept at the present time.”

“(c) At the Los Angeles Harbor Department Supply Yard, Berth 161, Wilmington.”

“(d) State in whose charge said damaged section [53] of pipe was placed and in whose custody it now is.”

“(d) The damaged section of pipe is in the custody of C. V. H. Brashier, plumber foreman.”

The next is XIV.

Mr. Yoakum: How about XII?

Mr. Verleger: I am not offering that.

Mr. Yoakum: How about XIII?

Mr. Verleger: I am leaving out XIII.

Mr. Yoakum: I think it ought to be read.

The Court: How about XIII?

Mr. Verleger: Your Honor, we are offering only those portions which we think contain admissions. I don't think we are particularly inclined to cover XIII for that purpose.

The Court: I suppose you don't have to offer XIII, if you don't want to.

Mr. Yoakum: The rule says any part that is germane and explains anything else should be read just like on a deposition.

The Court: We treat the interrogatories as a whole, and if you read one, you have got to read

them all. Now, that is one thing. But if we look at each interrogatory by itself, then it may be that the plaintiff doesn't have to read the interrogatory. Suppose he asks for some interrogatories and the interrogatories are available, but [54] there are some only that he wants to read. Then does he have to read everything else and put them in as his testimony?

Mr. Yoakum: We don't contend that, your Honor. We do think that under the rules if you use part of a deposition you can be required to introduce all that is relevant to that part. The same rule applies in using interrogatories.

Mr. Verleger: Your Honor, I don't have any strenuous objection to reading XIII.

The Court: Then read XIII, if you don't have any objection.

Mr. Verleger: Interrogatory No. XII.

"(a) State whether or not the City has at any time made any alterations of the soil in which said pipe was placed, as respects the corrosivity of said soil and for what purpose."

"(a) There have been no alterations of the soil in which the pipe was placed, as far as is known."

"(b) If such an alteration was made, state by whom it was made and the date, and what was its effect."

"(b) No alteration was made."

Interrogatory No. XIII.

"(a) State whether or not the pipe in question was made of cast iron." [55]

"(a) The pipe was made of ordinary cast iron."

“(b) If the answer to (a) is ‘Yes,’ state whether or not the City has experienced failure of cast iron pipes by reason of corrosion in any past occasions.”

“(b) The Harbor Department has experienced, infrequently, some failure of cast iron pipes, as well as steel pipes, and wherever such failure has been experienced, replacement has been made as the condition was discovered.”

Interrogatory XIV.

“(a) State the number of occasions on which the City has experienced failure of cast iron pipes due to corrosion:

“1. Within 5 years or less after installation of such pipes,

“2. Within 5 to 10 years after installation of such pipes, and

“3. Within 10 to 20 years after installation of such pipes.”

“(b) Give the date and place of each instance of a failure of cast iron pipe in the City of Los Angeles within the past 10 years, giving in each instance the cause of said failure, and the date and place thereof, the date of the installation of the pipe, the soil corrosivity or resistivity, the type of soil, the diameter class and method of manufacture of the pipe.” [56]

The answers to Interrogatory No. XIV are:

“(a) The number of occasions on which the City of Los Angeles Harbor Department has experienced failure of cast iron water pipes due to corrosion, prior to March 12, 1956, and within the times hereinafter mentioned, are as follows:

“1. Within five years or less after installation of such pipes—none, so far as is known.

“2. Within five to ten years after installation of such pipes—none, so far as is known.

“3. Within ten to twenty years after——

Mr. Yoakum: Just a minute. Your Honor please, I object to reading the answer to No. 3 on the ground that is not the true answer to the question. It was corrected in a supplemental answer to the interrogatory.

The Court: Overruled. You can read the supplemental answer, if you wish.

Mr. Yoakum: It doesn't represent the answer any more than if a reporter had written down something and the witness had corrected it. It wouldn't be the witness' answer.

The Court: Overruled.

Mr. Verleger: “3. Within ten to twenty years after installation of such pipes—two specific instances, one approximately fourteen years and the other approximately [57] fifteen years after installation, so far as is known.

“There is a great deal of cast iron water pipe installed in the ground serving Harbor Department properties which has been in service continuously since 1914 or thereabouts, without any apparent failure.

“(b) The only instances of failure——”

Mr. Yoakum: Again, we would have to make the same objection to (b), your Honor.

The Court: Same ruling.

Mr. Verleger: “The only instances of failure of

cast iron water pipe installed by the Harbor Department and serving its properties within the past ten years prior to the occurrence of March 12, 1956, so far as is known, are as follows:

"On February 15, 1954, a section of five-inch cast iron bell and spigot water pipe was replaced, due to corrosion, at Berth 60. On October 11, 1955, a section of eight-inch cast iron bell and spigot water pipe was repaired, due to corrosion, at Berth 59.

"There is no record of the method of manufacture of these pipes, nor was any test made to determine the corrosivity or resistivity, or the type of soil, so far as is known."

Interrogatory No. XV.

"(a) State whether the City made any effort to ascertain the reasonable life to be anticipated of the pipe [58] beneath Berth 69."

"No effort to ascertain the reasonable life of the pipe installed beneath Berth 59 was made, nor is any effort made to ascertain the reasonable life of any other cast iron pipe installed in the ground on Harbor Department lands, because it is impractical to dig up such pipe for inspection."

"(b) If the answer to (a) is 'Yes,' state by whom said effort was made, what the estimated life calculated was, whether any written records exist of said estimate, and when said estimate was made, and what the estimate was."

"No estimate is made of the life of such pipe, and no written records exist on the subject as far as is known."

Interrogatory No. XVII.

Mr. Yoakum: How about XVI? It should be read.

Mr. Verleger: As I recall, the answers to Interrogatory XVI are included in these answers and objections to them were sustained. Further answers were required. In any event, your Honor, I don't propose to offer the answers to XVI. I will offer the answers made following the sustaining of our objections.

Mr. Yoakum: We think it is germane and relevant to matters that have already been developed.

The Court: Suppose you read the interrogatories and the answers.

Mr. Verleger: All right. [59]

Interrogatory No. XVI.

“(a) Does the City have any maps of the City of Los Angeles or any parts thereof indicating the corrosivity of soils with respect to the various areas in the City?”

The answer is:

“No maps of the Harbor Department properties of the City of Los Angeles indicate the corrosivity of the soil, so far as is known.”

In connection with that one, I think perhaps we should read at the same time the answer given to the interrogatory after the objections were sustained and corrected answers filed.

Mr. Yoakum: I submit in the interest of orderly procedure, your Honor, we should complete this, because the next one will raise some entirely different objections.

The Court: Let's complete this interrogatory.

Mr. Verleger: Your Honor, the one I am referring to is the answer that was given to this interrogatory after the objection to the answers first given were sustained.

The Court: Let's complete this document then.

Mr. Verleger: All right.

“(c) Does the City have records of underground cast iron pipe failures which show size and class of pipe, location, dates of installation and of failure, type of soil and soil resistivity or corrosivity, or any of the above? [60]

The answer is:

“No records of underground cast iron pipe failure, showing the size and class of pipe, location, dates of failure, type of soil, and soil resistivity or corrosivity are kept by the Harbor Department.”

Interrogatory No. XVII.

“(a) State whether or not the City has in its employ engineers who are experts with respect to corrosion of piping.”

The answer is:

“The Harbor Department has a testing engineer, C. M. Wakeman, who tests materials for strength and other qualities, which are used in Harbor Department construction projects.”

“(b) If the City has such experts in its employ, state whether or not their services were used in any way in determining the reasonable life of the piping in question.”

The answer is:

“No records are available indicating that the

services of a testing engineer were used in any way in determining the reasonable life of the cast iron pipe in question laid underground at Berth 59 at or about the year 1914.”

The Court: I wonder if I can have a stipulation from the parties? I suppose all the area, not under the shed, but under the street, under this particular pier, was [61] filled land. This is a man-made harbor and I assume earth was brought in and filled under this complete area. Can you stipulate to that?

Mr. Perkins: We will so stipulate, your Honor, for the City.

Mr. Brennan: I don't believe the Outer Harbor, for its part, really knows how much of the island is man-made. Whether or not this particular area is man-made, I don't know. There has been evidence taken that there was a considerable amount of fill put into this, but whether it includes the entire area or not, I don't know.

The Court: Of course, I don't know from looking at the maps how much of the channel was cleared out and where the sand and debris was put. I don't know how the fill was made here. You have got a finger, evidently you have got a finger going out into the harbor, and on the finger are these installations. Now, I would be very much surprised if soil wasn't brought in to fill up in this particular area.

Mr. Verleger: I would assume that the probabilities are that that the soil pulled out in dredging out the channel was used in filling up the area.

The Court: But the question has been raised

here that these pipes were put in soil that had a high corrosive element in it. Unless you can show that this fill came from a place that had a high corrosive element—why, this [62] fill may have come from 50 miles away.

Mr. Verleger: Your Honor, our position is based on actual data with respect to the soil here itself. In other words, we have taken samples of the soil here and checked it.

The Court: Have you taken samples of the soil immediately around this break?

Mr. Verleger: We have taken samples of soil beneath the warehouse in question, that is correct.

The Court: Immediately adjacent to the break?

Mr. Verleger: We analyzed one sample which came from inside the pipe itself, which had to be soil, I would say, that must have fallen into it at the time of the break.

The Court: I don't know. We have got an area here corroded out about as big as your hand. Water came out, and the water would certainly keep the soil from falling in until it was turned off.

Mr. Verleger: Until it was shut off, but afterwards there would be people shoveling around there.

The Court: And you have got a sample of that soil, have you?

Mr. Verleger: Yes.

The Court: All right. Go ahead.

Mr. Verleger: Your Honor, I would like next to call Mr. Brashier. [63]

Mr. Yoakum: Just, a minute, your Honor please, Counsel has not completed the answers to the in-

terrogatories. As I said to your Honor, that answer was explained in the additional answers.

The Court: He wanted to read something in the interrogatory and you objected. You wanted this all read at one time. This is the only interrogatory he has presented. If you wanted to present another interrogatory at the proper time, you may do so. I don't know what it is.

Mr. Yoakum: We think, your Honor, when a witness makes an answer and then corrects it, certainly if he says one thing in a deposition, counsel can't just drop him there when he has corrected it some pages later.

The Court: Where are the other interrogatories?

Mr. Yoakum: That was filed July 15, 1957, additional answers to interrogatories.

The Court: Additional answers to interrogatories.

Mr. Yoakum: Yes. There is an answer with this same affiant. I submit in fairness, so that it will be in its proper context, it should be read.

The Court: What interrogatory do you want read?

Mr. Yoakum: What is on page 2 and goes over to page 3. It is headed, "Answers to First Requirement."

The Court: Don't you think this interrogatory and answer should be read? [64]

Mr. Verleger: I think the original document is an answer and as such is admissible. I think the subsequent one is self-serving and for that reason——

The Court: Well, you go ahead and read it, anyway. Let's get it into the record.

Mr. Verleger: Can you give me the page again?

Mr. Yoakum: Start at the top of page 2.

The Court: That was filed July 15th.

Mr. Verleger: That's right, and the others, as I recall, were filed in January.

Mr. Yoakum: February 15th.

The Court: Start at the top of the page.

Mr. Verleger: "First: Respecting plaintiff's interrogatory No. 8, the defendant The City of Los Angeles is required to give the dates of any reports made where evidence of a leakage occurred as to piping in the transit shed referred to in the defendant's answer to plaintiff's said Interrogatory No. 8, and to give the name of the person to whom said report was made."

The answer:

"The dates of any reports made where evidence of a leakage in the transit shed referred to in defendant's Answer to Plaintiff's Interrogatory No. VIII, and the name of the person to whom said report was made, are as follows: No leakage due to corrosion or otherwise was ever reported prior [65] to the escape of said water from said pipe, in said pipe or in other piping inside the transit shed referred to at Berth 59. The date and the names of the persons making and receiving the report on the leakage which occurred March 12, 1956, are given in the Answer to Interrogatory No. VI.

"Upon further investigation and study of Harbor Department records, affiant finds himself to have

been in error with respect to incidents of prior leakage given in his Answer to Interrogatory No. XIV(b) heretofore made as follows: 'On February 15, 1954, a section of five-inch cast iron bell and spigot water pipe was replaced, due to corrosion, at Berth 60. On October 11, 1955, a section of eight-inch cast iron bell and spigot water pipe was repaired, due to corrosion, at Berth 59.'

"Affiant now corrects said answer quoted above to read as follows: On February 15, 1954, a section of five-inch cast iron bell and spigot water pipe inside the transit shed at Berth 60, which shed is separated by a concrete fire wall and driveway from the transit shed at Berth 59, was repaired due to a straight sheer from an unknown cause. This break was not due to corrosion. The transit shed at Berth 60 was empty at the time and no cargo damage occurred. No record of a report of leakage has been found in Harbor Department files. The broken pipe was repaired with a split sleeve at a time when a bulkhead within the said transit shed [66] was undergoing repair. On October 11, 1955, at 4:15 p.m., Harbor Department plumber Dale Pence was notified by telephone by Margaret Reynolds, secretary in the operating division, of a water leak at Berth 59 in the street outside the transit shed opposite Door 25. On October 13, 1955, the leak, due to a broken leaded joint, was repaired. This leak was not caused by corrosion. No water damage occurred in the transit shed at Berth 59 at said time."

Your Honor, in view of my prior objection, I

would move to strike that on the ground it is self-serving.

The Court: Denied.

Mr. Verleger: Mr. Brashier, will you please take the stand?

I am calling Mr. Brashier also, if the court please, as an adverse witness pursuant to Rule 43(b). He is an employee of the City, your Honor.

Mr. Yoakum: To which we object on the ground he is not in the class of employee who can be called under 43(b), nor is he an employee of the City.

The Court: I will have to reserve my ruling until I get some testimony as to what he is doing, what his occupation is.

Mr. Brennan: We object to calling this man as an adverse witness, too, as far as the Outer Harbor is concerned. [67]

The Court: All right.

Mr. Wood: I would like to join in the objection on the ground as far as Grace Line he is not an adverse witness.

The Court: Swear the witness.

CHARLES VINCENT HARVEY BRASHIER, called as a witness herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Charles Vincent Harvey Brashier.

The Clerk: Will you spell that last name?

The Witness: B-r-a-s-h-i-e-r.

The Court: Will you go into his qualifications

(Testimony of Charles V. H. Brashier.)

now so if there is any objection I will know how to rule upon the objection?

Direct Examination

By Mr. Verleger:

Q. Mr. Brashier, on March 12, 1956, in whose employ were you?

A. Los Angeles Harbor Department.

Q. What position did you have with them?

A. Plumber foreman.

Q. How long before that had you worked for the City [68] of Los Angeles?

A. Approximately 37½ years.

Q. How long after that event did you work for them? A. Until March 1, 1958.

Q. On March 1, 1958, what happened? Did you retire? A. Yes, sir.

Q. Do you draw a pension from the City?

A. Yes, sir.

Q. You stated a little while ago that you were a former foreman at the time in question. Were you in charge of the plumbing work on the piping of the Harbor Department? A. Yes, sir.

Q. Did you have other plumbers under your direction? A. Yes, sir.

Mr. Verleger: I think, your Honor, that completes my foundation with respect to this witness.

The Court: What was the objection relative to not being a party who could be called under the rule?

Mr. Yoakum: There is no reflection on the witness, but I don't think he has the dignity of one who may be called and, furthermore, he is not an employee.

The Court: He was an employee at the time, wasn't he, of the occurrence?

Mr. Yoakum: Yes.

The Court: Do you mean to say if he is an employee [69] at the time of an accident and subsequently is fired or discharged, he no longer can testify?

Mr. Yoakum: I think if it is shown that it was a sham or something to prevent——

The Court: Have you got any authority?

Mr. Yoakum: I don't have one with me, no, your Honor, but I think that is clearly the rule. You have to be an employee.

The Court: The rule says a party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party——

I don't find anything here that says he has to be an officer, director, or managing agent at the time of the trial. He may have been such at the time of the transaction and between the time of the transaction and the time of the trial, which sometimes may be two or three years later, he may have severed his connection. I don't know of any rule which says because of that he can't testify.

Mr. Yoakum: He doesn't have the status of any of those, never had the status of any of those per-

sons enumerated, officer, director, or managing agent of this corporation. He was a plumber and plumber foreman at the time of the incident.

The Court: Have you got any authority as to this? [70]

Mr. Verleger: No, your Honor. I think the managing agent is a person who supervises. This man had other plumbers under his direction and control. That would seem to me to be sufficient for the purpose.

The Court: We have a case involving—well, let's be more specific. Let's take our Santa Fe case down here when the train ran off the tracks. Could you call the engineer as an adverse witness?

Mr. Verleger: I would say, your Honor, he would very clearly be adverse.

The Court: I know, but he is not an officer and he is not a managing agent. Of course, he is the man that really knows.

Mr. Verleger: The man who really knows. Your Honor, I think that, unlike this gentleman, a person like that would not have others under his direction, and that makes a substantial difference.

The Court: Managing agent usually means a manager of some kind. Well, now, let's take Lockheed, for instance. We will take a foreman, a supervisor of a gang. Can you call him as the managing agent because he manages a gang?

Mr. Verleger: It would seem to me for the purpose of the rule, one ought to be able to do so, your Honor.

The Court: It seems to me that you ought to, too, [71] but what have the courts said about it?

Mr. Verleger: Your Honor, all I can offer to do in that regard is take a look between now and 2:00 o'clock and turn up something that would perhaps be of help to the court.

The Court: It occurs to me this man may have information that is valuable to the court and information the court ought to have, but there has been an objection here. I don't think very much of the objection based on the fact that he is no longer working for the City. I could dispose of that very rapidly. But whether or not he comes within the definition, I don't know.

Well, it's nearly 12:00 o'clock. Let's see what we can find out about this during the noon hour. I will look and see what I can find about it, but don't rely upon me. I will rely upon you.

Court will now stand in recess until 2:00 o'clock this afternoon.

(A recess was taken to 2:00 o'clock p.m.) [72]

October 7, 1958, 2:00 o'Clock P.M.)

The Court: Have you been able to find anything?

Mr. Verleger: There is a case in 164 Fed. (2d) 996 in the Third Circuit Court where the testimony came from the train crew in an action for the death of a brakeman. I can quote a very brief paragraph that might be of help.

The Court: All right.

Mr. Verleger: The court says in its opinion that the facts came from the trainman who was permitted to be examined as a hostile witness. A footnote says: "We seldom quarrel with that exercise of discretion. Such permission gives the plaintiff greater latitude in the examination of his witnesses and the plaintiff is not bound by their testimony." The second case is *United States vs. Wardee*, United States Circuit Court of Appeals, Ninth Circuit, 175 Fed. (2d) 110. That was an action against the United States arising out of an automobile collision. The court permitted the examination of a petty officer of the Navy as an adverse witness. The driver in question had been a defendant in another action arising out of the same accident. The court makes the following remark:

"The third contention asserts error in permitting Wardee to call and examine McCoy as an adverse witness under [73] the rule."

It goes on to say:

"A reading of the testimony convinces us that the court did not abuse its discretion in indulging the presumption that McCoy, a former defendant in this action, would be an unwilling witness."

That as the Court well knows, involves two factors. However, Rule 43 applies to both hostile and unwilling witnesses, as well as to managing, and so on.

The third case is *Union Pacific vs. Ward*, Tenth Circuit, 280 Fed. (2d) 287. That is a case where error was assigned in permitting examination of an

engineer as a hostile witness. That was the hypothesis which the court put to counsel before recess. The observation was that the witness did not appear to be hostile, but he was the operator of the train involved in the accident. It was his negligence, if any, which spelled liability to the road. He was a veteran employee in a supervisory position. The railroad arranged for him to come to the trial, and it seems only fair to say that he was an unwilling witness to the plaintiff.

Those three cases are what we have found, your Honor. There is one other case which I can cite to your Honor, saying that the mere fact that a man has left the employ of the company does not change the situation. [74]

The Court: Have you got any authorities?

Mr. Yoakum: Yes, I think so. In *Dowell vs. Jowers*, 182 Fed. (2d) 576, Fifth Circuit, the court held specifically that an engineer, not an engineer, but an engineer in charge of what is called an acidizing crew that went in to work on a gas well was not an officer, director, or managing agent. It is an express holding.

I thought perhaps I was in error or naive about it. I thought we left this morning on the idea that this man was being called either as an officer, director, or managing agent, and that there was no claim of hostility. There has been no showing that he is a hostile witness.

There is one other case in California under 2055, under the statute as it read previous to a recent amendment which liberalized the rule, is *Abney*

against San Francisco, 115 California Appellate (2d) 506 at 513. A bus driver from the City of San Francisco, who was involved in an accident, could not be called as a managing agent of the City of San Francisco.

These cases that counsel for plaintiff has cited, the first one, the point wasn't really discussed, we just passed over it and assumed it in a footnote, and the other two are not applicable to the matter under discussion this morning, they both being related to the hostile witness aspect of the matter. [75]

The Court: I would like to ask counsel a question. This term managing agent is not only mentioned in Rule 43, but is mentioned in at least two other rules. One is 26 and one is 4. Rule 4 has to do with the question of service of summons on a managing agent. Would you feel that you could serve this witness a process on the theory that he is a managing agent?

Mr. Verleger: No, your Honor.

The Court: Then you think there is a distinction between the term managing agent as used in Rule 4 and as used in Rule 43?

Mr. Verleger: I would think so, your Honor. I am thinking, further than that, my feeling was the question was simply whether I could examine this witness under Rule 43(b) as an adverse witness, and if the first sentence about whether the witness is hostile or unwilling is relevant, the cases that I have cited indicate that a person with the type of affiliation the witness with the defendant herein is such a witness, your Honor.

The Court: I will read to you from a decision rendered by Judge Albert. He is a district judge in Sacramento. This is found in 20 Federal Rules Decisions 583, or in 25 Federal Rules Service 775. Judge Albert says:

“Examination of available law discloses a singular lack of articulating definite standards with regard to the [76] meaning of the term managing agent as the same is used in Rule 43(b). The Fifth Circuit”—and this is one of the cases cited—“The Fifth Circuit summarily found the defendant’s engineer in charge of an acidizing crew was not an officer, director, or managing agent, and failed to mention what standards of tests were applied to reach this conclusion.

“The Third Circuit in *Moran vs. Pittsburgh & Des Moines Steel Company*, 182 Fed. (2d) 467 found that the signing of a partnership stationery by the manager, although in fact such person was not a manager of the partnership, nor officially connected with the partnership in any capacity, was sufficient to constitute the witness a managing agent of the partnership for the purpose of Rule 43(b). Again no definite standards are set forth.

“The District Court for the Western District of Wisconsin in 1939, in the case of *Peterson Construction Company vs. Lafayette County, Wisconsin*, 2 Federal Rules Service 43.2, case 1, District Court for the Western District of Wisconsin, held a construction superintendent employed by a corporate party was not an officer, director, or managing agent of the corporation, because he had only

limited authority. How his authority was limited is not made apparent by the version of the case in Federal Rules Service.

“No other case construing this facet of Rule 43(b) [77] has been cited to me, and in my research on the point I found no other case bearing directly on the problem.”

Now, this is 1957.

Now, Judge Albert seemed to think he had come to a conclusion as to what is meant by managing agent by referring to Rule 26(d). I think I can come to some conclusion by referring to Rule 4(b). I don't think that service of process upon this witness as managing agent would be any good at all. I can't see how he can come within the rule as managing agent. He may come under the rule as a hostile witness, but do you have a right to call any witness as a hostile witness?

Mr. Verleger: Your Honor, I would suppose that a witness who had been for a great many years the employee of the defendant who had been in charge largely, as I understand, of maintenance of the very type of instrumentality which failed, and who is currently receiving a pension from the defendant, would within the purview of a rule of that sort be treated as a hostile witness. I don't think the term can be confined to people who make a display of hostility on the witness stand, because the most effective hostile witness can be a witness who doesn't show any hostility at all.

The Court: Then any employee of a defendant corporation can be called as a hostile witness so

long as his [78] loyalty is with the defendant corporation?

Mr. Verleger: To me, your Honor, that is the only way of reconciling the cases that deal with the railroad engineer, for example.

Mr. Yoakum: Then, of course, you don't need that other part of the rule in there at all. It is just surplusage, because anybody that has had an honorable career with any company is presumed hostile to the other side.

The Court: I can't find any cases that go that far, although Judge Albert does comment upon the fact that the witness before him was an employee, had been an employee for a long time, and it was natural to assume that his loyalty would be with the defendant, rather than with the plaintiff, and he allowed the examination.

I think I will sustain the objection.

Mr. Verleger: Your Honor, in that event, we will request in any event that the witness take the stand for our own limited purposes. We hope to do what we can without benefit of the rule, your Honor.

The Court: All right.

Mr. Verleger: Reserving, of course, any rights we have by reason of the court's ruling.

The Court: All right. Come forward. [79]

CHARLES VINCENT HARVEY BRASHIER, recalled as a witness by the plaintiff herein, having been heretofore duly sworn, was examined and testified as follows:

Direct Examination
(Continued)

By Mr. Verleger:

Q. Now, Mr. Brashier, I think you testified this morning that you had been in the employ of the City since 1919, approximately, is that correct?

A. Yes, sir.

Q. Will you again tell me briefly what jobs you held with the City during that period of time?

A. The first two to three years, approximately there, I worked on a piledriver, driving piling.

Q. Mr. Brashier, you will pardon me if I interrupt you. Maybe it will speed things up if I go back a little.

Prior to 1946, how long had you been a plumbing foreman for the City?

A. I was not really classified as a plumber foreman, but rather as a lead man from about——

Q. Whatever the position may have been, how long did you have it before, sir?

A. Before when?

Q. Before 1956, when this break took place.

A. I would like to ask if your question is correct. I [80] was foreman from March, 1949, was former foreman.

Q. From March, 1949, through 1956, you were a plumbing foreman, is that right?

(Testimony of Charles V. H. Brashier.)

A. Yes, sir.

Q. You had a number of plumbers working under you, is that correct? A. Yes, sir.

Q. Was it your job to maintain the plumbing, the piping, of the City of Los Angeles in the Harbor Area? By that I mean the plumbing under the jurisdiction of the Harbor Department.

A. Yes, sir.

Q. Where repairs were called for to that system, I take it it was you or the men under your direction during that time who made them, is that right? A. Yes, sir.

The Court: May I ask a question?

Mr. Verleger: Surely, your Honor.

The Court: Did you work for the City of Los Angeles?

The Witness: Yes, sir.

By Mr. Verleger:

Q. Prior, then, to 1949, for a number of years previously, were you a plumber for the City?

A. I was rated, I believe, on their books as a pipefitter [81] and plumber. I did both of those classes of work.

Q. At any rate, roughly, from 1935 to 1949, you were a plumber and pipefitter for the City, is that right? A. Yes, sir.

Q. Let me ask you this. In connection with your job, have you become familiar with the piping in the area of Berth 60, Berth 59, Berth 58, and Berth 57 of the City of Los Angeles? A. Yes, sir.

(Testimony of Charles V. H. Brashier.)

Q. So that you can tell us what pipes there are and where they go, is that right?

A. Yes, sir.

Q. Now, referring to Plaintiff's Exhibit 1 for identification, am I correct in stating that the area between Berth 60 and Berth 68 and Berth 59 and 69 to 70, and likewise running on down here, is known as Signal Street? A. Yes, sir.

Q. Is it correct to state that in the center of Signal Street there there is a 10-inch water main that is operated by the Water Department of the City of Los Angeles?

A. That water main is not in the center of the street.

Q. Then would you tell us where it is?

A. It is approximately 10 feet east of the west curb line.

Q. 10 feet east of the west curb line. I see. Then [82] approximately at any rate 10 feet east of the west curb line, in that area, there is a 10-foot main that belongs to the City of Los Angeles and which is operated by the Water Department, is that right? A. Yes.

Q. Does this entire area have a name or any convenient word we can use in referring to the whole of it?

Mr. Perkins: I will stipulate the area is called Pier A.

Mr. Verleger: I will be pleased to so stipulate.

Mr. Perkins: Or Pier 1.

Mr. Verleger: Pier 1. All right.

(Testimony of Charles V. H. Brashier.)

Q. Then referring to this entire area as Pier 1, does this 10-inch main go from the intersection of East 22nd Street and Signal Street close to the end of Pier 1? A. Yes, sir.

Q. Now, does the Harbor Department or does the City of Los Angeles, let me put it that way, acting through the Harbor Department, have a main of any kind which parallels this 10-inch main in any way? A. Yes.

Q. Can you describe this parallel main for us?

A. It is an 8-inch cast iron main running parallel to the 10-inch main, beginning—this next statement is approximately a guess—approximately 200 feet south of the south [83] curb line of 22nd, and extending to approximately 200 feet north of the south end of Berth 60.

Q. In other words, there is a line, an 8-inch line of the Harbor Department, which starts about 200 feet away, 200 feet this side of East 22nd Street and parallels the 10-inch main to a point short of the outboard end of Berth 60, is that right?

A. Yes, sir.

Q. Is this 8-inch main of the Harbor Department connected in any way with the 10-inch main of the Water Department? A. Yes, sir.

Q. At how many places is it so connected?

A. Three.

Q. Now, could you step down here and indicate on this drawing approximately where the three connections are? A. Yes, sir.

Q. Would you do so, please?

(Testimony of Charles V. H. Brashier.)

(Witness leaving stand and going to black-board.)

Q. Do you want to mark there where they are?

The Court: And let's mark these B-1, -2, -3.

The Witness: Approximately 200 feet south of 22nd Street is the first one.

Mr. Verleger: Do you want to put the word B-1 there? [84]

Mr. Yoakum: Will you extend it up into here so that it can be readily seen, and draw a line?

(Witness complying.)

Mr. Verleger: Then where would the second be? Go ahead.

(Witness indicating.)

Mr. Verleger: Would you like to mark that B-2, sir?

(Witness complying.)

Mr. Verleger: Would you mark where the third is, sir?

(Witness complying.)

Mr. Verleger: Referring to this 8-inch main of the Harbor Department—will you take the stand again for a minute?

(Witness resuming stand.)

By Mr. Verleger:

Q. Referring now to this 8-inch main of the Harbor Department, does that have any source of

(Testimony of Charles V. H. Brashier.)

water other than the three connections onto this 10-inch main? I'm sorry. If I am not clear, I apologize.

As I understand it, you have testified it is connected at three points to the 10-inch water main of the Harbor Department. Is it connected at any other place with any other source of water?

A. I would consider a tank a source of water—could [85] I?

Q. I think you could. A. Yes.

Q. Where is it connected? Is it connected to a tank? A. Yes.

Q. Is it connected to more than one tank?

A. No.

Q. Is it connected to any source other than, first, the tank, and, second, the 10-inch water main of the city? A. No.

Q. Where is this tank?

A. On the roof of the No. 1 warehouse.

Q. Would you like to indicate where the tank is?

(Witness leaving stand and going to exhibit and marking it.)

Mr. Verleger: Would you mark that as B-4, please?

(Witness complying.)

The Court: Where does that tank get its water?

The Witness: From the 8-inch fire main.

The Court: From the what?

The Witness: From the 8-inch main.

(Testimony of Charles V. H. Brashier.)

The Court: 8-inch main?

The Witness: From the 8-inch main, yes.

By Mr. Verleger:

Q. In other words, the water comes from the city 10- [86] inch water main into the 8-inch main, and from the 8-inch main up to this tank, is that right? A. Yes.

Q. Is the tank connected at all times and is the connection into the system open at all times?

A. Yes, sir.

Q. Is there anything that keeps water in it other than the pressure of the system? A. No.

Q. So that if at any time then, so I am clear, there is a leak of any kind of sufficient size, put it that way, so as to relieve the pressure, water would tend to run out of that tank as well as from the city source, is that right?

A. If the pressure in the tank was greater than the city water pressure.

Q. Yes, or if the city water pressure was sufficiently relieved by the break. A. Yes.

Q. To where does the water in this 8-inch main go?

The Court: What do you mean?

Mr. Verleger: I am sorry, your Honor.

Q. Are there other pipes that go off this 8-inch main into various buildings? A. Yes.

Q. Into what buildings do they go? [87]

The Court: Can't you stipulate? It seems to me all these facts have been agreed to by the parties.

(Testimony of Charles V. H. Brashier.)

I don't know why it is necessary to produce a witness to establish facts you all agree to.

Mr. Verleger: If we are all in agreement that the sole purpose for which this system is used is to supply water to the sprinkler systems in these buildings, and to also supply water at the valves of the various fire hoses within the buildings, why, I don't know of any need for any further questions. Is there any dispute about those?

The Court: Can you stipulate?

Mr. Yoakum: So I can be sure I understand it and don't embrace something I don't understand, we will be willing to stipulate that the water from the 8-inch main maintained by the Harbor Department is used solely for fire prevention purposes in these various berths, and that it feeds into the berths in the places indicated by the lateral coming off of the mains, there being two laterals into each berth.

Mr. Verleger: Just again, so we express the fire prevention purposes precisely, my understanding is what it does is provide water first for the sprinkler systems within those buildings and, second, at the various fire hoses which are attached to the walls in the buildings. Is that what we understand?

Mr. Yoakum: You understand that the sprinkler [88] systems are for fire prevention purposes.

Mr. Verleger: What I want to do is stipulate to the facts, rather than the adjective which may be used to describe them.

Mr. Yoakum: I think I state my position that

(Testimony of Charles V. H. Brashier.)

this water from the 8-inch main goes into these various places solely to be used for either fire prevention sprinklers or fire prevention hoses.

Mr. Verleger: May I ask, is there any dispute, is there any suggestion that they go anywhere except to the sprinkler systems or to these hoses?

Mr. Yoakum: And to the tank.

Mr. Verleger: And to the tank.

Mr. Yoakum: Which is a fire tank.

Mr. Verleger: Yes. That is stipulated to.

Mr. Yoakum: Unless I am corrected. I think that is right. Yes, that is correct.

Mr. Verleger: I take it there is a further matter which I would inquire into as to whether there is any dispute. On each of the three connections from this 8-inch main to the 10-inch main of the water department, there is a water meter. May we stipulate to that, also?

Mr. Yoakum: I am afraid that is an over simplification of the matter. That might mislead the court. There is a meter, but it is not the conventional type that you might [89] expect, and I think it needs some explaining. Mr. Perkins thinks we ought not to try to stipulate to that feature.

Mr. Verleger: All right, as counsel prefers.

Q. While I am here, Mr. Brashier, may I ask this. Are there any meters placed on the three lines which lead from the Water Department 10-inch line to the Harbor Department 8-inch line?

A. Yes.

Q. Will you describe those meters?

(Testimony of Charles V. H. Brashier.)

A. They are generally a three-quarter or a one-inch meter attached to the side of a Hershey check valve.

The Court: What are the purposes of the meters?

The Witness: To detect the flow of water, a small stream of water, in the event someone would start using it for domestic purposes, using it for something other than fire.

The Court: Would the meters indicate any leakage of water?

The Witness: Yes, as long as it wasn't over an inch size.

The Court: Over a what?

The Witness: Over an inch size of water.

By Mr. Verleger:

Q. Those meters had devices on them, I take it, for recording the amount of water which flowed through, is that right? That is, they had the ordinary dial you have on a [90] water meter which shows the number of cubic feet, how much water flowed through?

A. That was going through the one-inch meter, on the side of that valve, yes.

Q. You referred to the existence of a Hershey gate valve in there.

A. A Hershey check valve.

Q. A Hershey check valve. Will you describe briefly what the Hershey check valve is?

A. Hershey check valve is a swinging object

(Testimony of Charles V. H. Brashier.)

that is pushed open by the pressure of water. When the water stops flowing, it closes off.

Q. So long as the flow of water—the one-inch meter is set up as a by-pass for the valve, is it not?

A. Yes.

Q. So long as the flow of water is such that it can pass through the meter, the check valve remains closed, is that right?

A. Yes.

Q. When the system is opened up, if it is hypothetically opened up so as to sprinkle generally the warehouse in the manner generally in fire, the main valve opens up, is that right?

A. If enough sprinklers went off, yes.

Q. And similarly, if there were enough hoses turned on, [91] the main valve would open, is that right?

A. Yes.

Q. Did you, Mr. Brashier, read those meters at any time?

A. No, sir.

The Court: You mean personally?

By Mr. Verleger:

Q. Personally, first.

A. No, sir.

Q. Did anyone under your direction read those meters?

A. No, sir.

Q. At any time were you ever called upon to make repairs by reason of readings found in those meters?

A. No, sir.

The Court: Were you the superintendent there relative to these lines?

The Witness: No, sir.

The Court: Was it your duty to read the meters?

(Testimony of Charles V. H. Brashier.)

The Witness: No, sir.

Q. (By Mr. Verleger): So far as you know, did anybody in the Harbor Department read those meters?

A. Not that I know of.

The Court: What were they there for?

The Witness: For the Water Department to detect if [92] anyone was stealing water off of them.

The Court: If nobody read those meters, how could they detect it?

The Witness: He asked me the question, your Honor, if the Harbor Department read them. The meters do not belong to the Harbor Department.

The Court: To whom do they belong?

The Witness: To the Water Department.

Q. (By Mr. Verleger): Was there any physical obstacle preventing you or anybody working for the Water Department from picking up the man-hole cover and reading those meters?

A. No.

Q. Now, then, Mr. Brashier, on March 12, 1956, were you called out there to Pier 1 by reason of a leak?

A. Yes, sir.

Q. Can you tell us as well as you can remember what happened that morning from the very moment you heard of the leak?

A. Well, I just got up in the morning and was in the bathroom at the time when the phone rang. I was informed that there was a water leak at the Outer Harbor in the area of Berth 59.

Q. Who called you, do you know?

A. A Harbor Department watchman. [93]

(Testimony of Charles V. H. Brashier.)

Q. What did you do thereafter?

A. Proceeded to get dressed, get in my car, and go to the Outer Harbor, Berth 59.

Q. Do you remember about what time it was you were called?

A. Somewhere about 6:00.

Q. Do you remember about what time it was when you got there?

A. About a quarter to 7:00, something like that. I didn't look at a watch, sir.

Q. What did you do when you got there?

A. Stopped my car and got out my boots and put them on, took out my key wrench and closed the water off.

Q. You refer to a key. What was the key you took out?

A. A key wrench.

Q. Is this a special type of wrench for the equipment involved?

A. Yes, sir.

Q. After you got the water turned off, did you do anything to locate the leak?

A. Immediately, sir?

Q. No. At any time.

A. Yes.

Q. How soon after you turned off the water did you start to locate the leak? [94]

A. It was possibly two hours.

Q. What did you do in order to find the leak?

A. I sounded the pavement.

Q. You sounded the pavement in Berth 59?

A. I sounded the pavement over the pipe.

Q. Was the pavement you refer to in Berth 59 or out in Signal Street?

(Testimony of Charles V. H. Brashier.)

A. It was on the loading platform outside the warehouse.

Q. Referring now to Exhibit 1 again, there is a loading platform, that being an area that is raised three or four feet high above the street level, on the street side of Berth 59, is that right?

A. Yes, sir.

Q. And the floor of that loading platform is concrete, and that floor goes right on into the building, is that right?

A. In some places it goes on.

Q. Yes, where it goes through the doors.

A. Yes, sir.

Q. You spoke of sounding the pavement on the loading platform.

A. Yes, sir.

Q. And you located the leak, I take it, by finding a spot where the paving sounded hollow, is that right?

A. I knew where the pipe was, sir. [95]

Q. You knew which pipe it was that was probably leaking?

A. Yes.

Q. Then having found the spot you, I take it, caused the pavement to be broken off and got in and found the particular pipe that was leaking, is that right?

A. Yes, sir.

Q. Referring now to Plaintiff's Exhibit 20, is this a picture of part of the process of repairing the leak?

A. Yes, sir.

Q. Referring now to Plaintiff's Exhibit 17, is this also a picture of part of that process?

A. I believe that to be the same place.

(Testimony of Charles V. H. Brashier.)

Q. When you made your repair, did you cut out the section of damaged pipe and remove it?

A. Yes, sir.

Q. You did this with the aid of a burning torch or some such instrument? A. Yes, sir.

Q. I will ask you whether or not those are photographs of the pipe which failed as removed from the spot there?

Mr. Yoakum: They have been embellished, haven't they?

Mr. Verleger: There seems to be some extra things on them. There is a tape mark. [96]

Mr. Yoakum: There is tape and there is a stick.

Mr. Verleger: That's right, but is that, nevertheless, a piece of pipe?

Mr. Yoakum: As long as they don't represent the pipe as it was torn out.

The Witness: I couldn't swear that was the pipe they took out. That looks like most any pipe. This one looks like the pipe that I removed.

The Court: May I ask a question? You say, "I removed." Did you do the actual work?

The Witness: I was standing there watching it being removed.

The Court: Let me ask you another question. This defective pipe was cut out and new pipe was put in, I suppose?

The Witness: Yes, sir.

The Court: Did you make an inspection of the pipe adjacent to the leak?

(Testimony of Charles V. H. Brashier.)

The Witness: I made an inspection of the pipe adjacent to this.

The Court: I'm sorry?

The Witness: I cut that off.

The Court: This case may be appealed and when it goes up on appeal, they won't know what "this" means. You cut out a section of pipe. Did you make an inspection to see what condition the pipe was in beyond the break, or before you [97] got to the break?

The Witness: I inspected the pipe where I cut it off. I did not pursue the pipe farther than where it was good to make the necessary repairs.

The Court: So you don't know what the condition of the line was other than just near the place the break took place?

The Witness: That's right.

The Court: There was a defective piece of pipe there, you cut it out and put in a new piece?

The Witness: Yes, sir.

Q. (By Mr. Verleger): How large a piece of pipe did you cut out?

A. Oh, approximately six, seven feet.

Q. Was there a hole through the pipe?

A. Yes, sir.

Q. How large was the hole?

A. About the size of my hand.

Q. Did you find a piece that had fallen out of that hole, or anything of that sort, in the vicinity?

A. No, sir.

Q. Did you see whether the metal of the pipe

(Testimony of Charles V. H. Brashier.)

was hard in the vicinity around the pipe or around the hole, or was soft? A. I did not. [98]

Q. Did you make any check to see if the pipe itself—there is a term sometimes used by plumbers in describing a pipe as soft, isn't there?

A. Yes.

Q. Did you make any check to see if any part of this section of pipe you took out was soft?

A. Yes.

Q. What did you do?

A. Used my hammer on it.

Q. Did you scratch away any of it to see if any of it was soft?

A. That is the way you find if it is soft.

Q. Did you find this part you removed was soft?

A. Yes.

The Court: Let me ask you a question. You found this pipe was soft. How do you know how large a section to cut out?

The Witness: Your Honor, when the metal has left the pipe, it becomes like a soft carbon. Taking your hammer, you can hit it and it will sound entirely different. As you hit the dead spot, you can dig it. If it is good pipe, you do not.

The Court: Well, I take it from the testimony that this pipe failed in only a very small area and the rest of the pipe other than that small area was good? [99]

The Witness: As far as I know. It was buried under railroad tracks. It was good where I caused it to be cut off.

(Testimony of Charles V. H. Brashier.)

Q. (By Mr. Verleger): I believe you referred to one of these pictures as appearing to be the pipe the way you removed it. Could you indicate which one of these so appeared to you?

A. This hole and everything looks like the pipe.

Q. You are referring to Plaintiff's Exhibit 19 for identification?

A. Yes, this one.

Mr. Verleger: Your Honor, at this time I would wish to offer Plaintiff's Exhibits 19, 17 and 20 in evidence.

The Court: They may be received.

The Clerk: Plaintiff's Exhibits 17, 19 and 20 in evidence.

(The exhibits, marked Plaintiff's Exhibits 17, 19 and 20, were received in evidence.)

The Court: May I ask this witness a question?

This pipe that we have been talking about, it comes in sections when it is laid, doesn't it?

The Witness: Yes, sir.

The Court: How long are the sections ordinarily?

The Witness: They are from 10 to 18 feet. It would be according to the time that they were manufactured. [100]

The Court: The piece that you cut out, did you cut out an entire section or did you cut out a part of a section?

The Witness: They were two short pieces of pipe that had been used in that particular area.

(Testimony of Charles V. H. Brashier.)

The Court: Do I understand you cut out a part of two sections?

The Witness: A part of two sections, yes, sir.

The Court: A part of two sections. All right.

Q. (By Mr. Verleger): When you got down into the hole there, you found, I take it, the dirt had been washed away from around the pipe to an extent, is that right?

A. Yes, sir. Pardon me, sir.

Q. Do you wish to correct your answer? Go ahead. A. What was the question?

Q. My question was, when you opened up the paving, you got down into the hole, and you found that some dirt had been washed away, is that right?

A. Yes, sir.

Q. After you got the sections of pipe out, where did you take them?

A. To the Harbor Department supply yard at Berth 161, Wilmington.

Q. Were they kept there thereafter?

A. So far as to my knowledge, yes. [101]

Q. So far as you know, was their condition changed thereafter?

A. Ask the question again, please?

Q. So far as you know, was their condition changed after being taken to that yard?

Mr. Yoakum: I object on the ground that it is uncertain. I don't know what the question means. I don't think the witness knows.

The Court: How would he know unless he made an examination?

(Testimony of Charles V. H. Brashier.)

Mr. Yoakum: I don't know what he means by it.

The Witness: I don't know that there was ever any change in the pipe after it was taken to the yard, sir.

Q. (By Mr. Verleger): Did you see the pipe in the yard at a time subsequent to the time it was taken to the yard?

A. I don't recall any special instance that I actually looked at it.

Q. Do you know whether you have seen it at all after it was taken to the yard? A. No.

Mr. Verleger: I don't think I have any further questions of this witness.

Mr. Yoakum: If the Court please, I would have considerable questions of this witness, but perhaps they might [102] not be considered in the nature of cross-examination, so I suppose the proper procedure would be to just examine him with reference to matters that Mr. Verleger examined him on and defer the rest.

The Court: I would suggest while we have the witness on the stand you get all the information you want from him and then he can be excused. There is no use keeping him here.

Mr. Verleger: Your Honor, I have one rather short witness I would like to get on and off the stand sometime this afternoon. That would be the only thing I have in mind.

The Court: It shouldn't take very long, should it?

Mr. Yoakum: If we do all of the anticipated

(Testimony of Charles V. H. Brashier.)

examination, it will take some time to follow your Honor's suggestion about concluding with the witness. So I would think we might defer to the convenience to this brief witness. I will be some time unless you just want me to examine him as to matters developed on direct.

The Court: I was just thinking about the convenience of the witness, but if the witness is working for the City of Los Angeles, the Harbor Department or somebody else, maybe he could come back and testify.

Mr. Yoakum: Of course, he isn't working for the city or the Harbor Department, but I think he will come back to testify. [103]

The Court: That's right. If he is retired, I guess he doesn't have to be anywhere, I suppose. Maybe you better restrict your examination to cross-examining the witness on what was covered in direct and wait until the proper time to put on your case.

Mr. Yoakum: All right.

Cross-Examination

By Mr. Yoakum:

Q. Mr. Brashier, during the time you worked for the city, did you always work for the Harbor Department of the city? A. Yes, sir.

Q. Referring to this Exhibit 1 for identification, which is this drawing, I wish that you would locate on there the place where the turnoff valve was by means of which you shut off the water on the

(Testimony of Charles V. H. Brashier.)

morning of March 12th. Come down here, please, and mark it and then indicate it by a B-5. Do you have the question in mind? Where was the turnoff valve which you turned with your key that morning?

(Witness leaving stand and indicating on exhibit.)

Q. Before you go back to your seat, I call your attention to the testimony this morning of Sebastian Miretti. He indicated as point M-1 the point where you turned off the valve. I am pointing to it. That is not correct, is it? [104]

A. There is no valve there on the fire main.

Q. This was a fire main valve that you turned off that morning?

A. Yes, sir.

Q. Showing you Exhibit No. 20, the workman down in the hole there, does that picture show the part of the pipe that you removed?

A. I removed—that is part of it. That shows part of it.

Q. If I interpret the picture correctly, there seems to be a lateral off close to the pavement, more or less running horizontally, and then it is going down by means of a T, descending vertically. Where with reference to that T was this piece that you removed?

A. I removed this pipe below the T back to just inside this wall, this representing the wall here, see, down in there. I cut that off there. This is an L. This piece drops down here, and this is an L, turns

(Testimony of Charles V. H. Brashier.)

at right angles, and runs back out through this loading platform into the street.

Q. From the L at the bottom of the fitting here running toward the ladder, there was the section of pipe that you removed, is that correct?

A. Yes, sir.

Q. This next picture, Exhibit 17, does that show the [105] piece of pipe that was removed?

A. Yes.

Q. There is a workman here with a welding torch.

A. Melting out the lead out of the joints.

Q. Is this joint here where he is working headed towards the shed?

A. I am of the opinion that is going out under the street, the way it is laid. It is hard to tell from the picture, because it is only a hole in the ground. It is hard to say which way it would be looking, but I think that is so. Otherwise, they would show an L pipe going under it as shown in this picture.

Q. I direct your attention to the bell portion of the pipe which appears almost directly below that workman's head. Was that piece removed?

A. Yes.

Q. Did you remove some of the pipe that extends to the right as you look at this picture?

A. Yes.

The Court: And some of the pipe that extends to the left?

The Witness: Yes.

Q. (By Mr. Yoakum): So you removed from

(Testimony of Charles V. H. Brashier.)

the point on the left where the workman is cutting out a distance how far over from the bell [106] to the right?

A. I would say somewhere from seven to eight feet over to this L as shown in this other picture.

Q. Are you able to tell either by looking at that picture or from memory where the hole was in this pipe?

The Court: You mean whether it was up on the side or the top or the bottom?

Mr. Yoakum: Well, first, your Honor, let's see if he can tell us where along the axis of the pipe the hole was. Was it near where this man was doing the burning or was it over toward the right side of the picture?

The Court: What is your answer?

The Witness: It is almost impossible to tell, but I believe it to be near this bell on this piece of pipe as far as my memory is concerned.

Q. (By Mr. Yoakum): To the right of the bell, as far as you know? A. Yes.

Q. Was the hole on the down side of the pipe or on the upside? A. The down.

The Court: That picture there of the pipe——

Mr. Yoakum: Your Honor, this one here, you mean 19?

The Court: 19. That only shows a part of the pipe [107] that was removed, doesn't it? It doesn't show the entire pipe that was removed? I am asking you.

(Testimony of Charles V. H. Brashier.)

The Witness: You are asking me? That is correct. This piece of pipe represents this piece of pipe. This pipe was——

Q. (By Mr. Yoakum): Let's get this clear. Wait a minute, now. The piece of pipe that appears in Exhibit 19 is the same as the longer length of pipe running to the right of the bell in Exhibit 17, is that right? A. That's right.

Mr. Yoakum: Did you have any more questions, your Honor?

The Court: No.

Q. (By Mr. Yoakum): Do you know whether you painted any symbol or identification on that pipe when it was taken out?

A. I did not paint any symbol on it.

Q. Did you see any symbol or number or other means of identification? A. No, sir.

Mr. Yoakum: I have nothing further.

The Court: Any other question? [108]

Cross-Examination

By Mr. Brennan:

Q. On the morning of March 12th when you went down, did you shut off any other valve other than the lead-in valve that you have marked on the blackboard? A. No, sir.

Q. Did you go into any of the pits that are located along Beacon Street? A. No, sir.

Q. Other than just the one that you shut off.

A. That was a street valve. That was not a pit.

(Testimony of Charles V. H. Brashier.)

Q. Were any of the pits that morning?

A. I saw some firemen opening pits.

Q. Were some of these firemen going into the various pits?

A. They claimed they were going to shut the water off.

Q. You saw firemen going in and out of the various pits along Beacon Street, did you?

Mr. Yoakum: Pardon me, counsel. It is not Beacon Street. It is Signal.

Mr. Brennan: Signal Street is what I should have said. I am sorry.

The Witness: Yes, sir.

Q. (By Mr. Brennan): Are there any outlets from this 8-inch line other [109] than sprinkler heads and the valves of the fire hoses?

A. No, sir.

Mr. Brennan: That's all I have.

The Court: Any other questions?

Mr. Wood: I have no questions.

The Court: Any redirect?

Mr. Verleger: I don't think so.

The Court: You may step down.

We will recess until 10 minutes after 3:00.

(Recess.)

The Clerk: All parties are present. Now ready for further testimony. Defendant City of Los Angeles has now had marked for identification their Exhibit No. G.

(Testimony of Charles V. H. Brashier.)

(Exhibit was marked Defendant's Exhibit G for identification.)

Further Cross-Examination

By Mr. Yoakum:

Q. I direct your attention to this piece of pipe down here that is marked G and has got a big 59 on it there, Mr. Brashier, and I ask you if that is a portion of the section that is indicated here in the Plaintiff's Exhibit 19?

A. I believe it to be the same section, yes.

Q. I direct your attention to the little hole in 19, through which a stick has been stuck, and I direct your attention to a little hole here about the size of what a small [110] finger could get through, and ask you if you can tell us anything about that little hole.

A. I made that with a claw hammer.

Q. Why did you do that?

A. Testing the pipe.

Q. This Exhibit G for identification, it would be the portion of the pipe farther away from the bell end as shown in this Exhibit 19, would it not?

A. Yes, sir.

Mr. Yoakum: We would like to offer that as the Defendant's Exhibit G.

The Court: It may be admitted.

The Clerk: Defendant's Exhibit G in evidence.

(The exhibits heretofore marked Defendant's Exhibit G was received in evidence.)

(Testimony of Charles V. H. Brashier.)

Mr. Yoakum: Your Honor please, the bell end hasn't come up here yet. Probably it will be here within the next few minutes. I don't know whether this witness should remain for that purpose of identification.

The Court: We will put this in as Exhibit G and when you get the bell end here, we will put it in as Exhibit G-1.

Mr. Yoakum: All right.

The Court: Any other questions?

Mr. Verleger: Just one short question. [111]

Redirect Examination

By Mr. Verleger:

Q. You testified, I think, that the whole soft pipe was taken to the yard of the Harbor Department and was kept there for a period. So far as you know, was any other similar piece of pipe taken over to the Harbor Department and kept there, or was this the only piece of pipe of that sort that was dug up there?

A. Well, now, there are two pieces of pipe.

Mr. Verleger: Let me rephrase the question then, your Honor. I am sorry.

Q. Was whole pipe from any source other than Berth 59 taken over to the Harbor Department yard, say, within the next six months after this affair?

A. I don't recall of any particular pipe. However, if any had been removed, no doubt it would have been taken there.

(Testimony of Charles V. H. Brashier.)

Q. You were the foreman of the plumbers at that time, is that right? A. Yes, sir.

Q. So far as you know, no other was removed, is that right?

A. Not to my knowledge or not to my recollection.

Mr. Verleger: Nothing further.

The Court: You may step down.

(Witness excused.) [112]

Mr. Verleger: Mr. Drake, will you take the stand, please?

JOHN F. DRAKE,
called as a witness on behalf of the plaintiff,
having been first duly sworn, was examined and
testified as follows:

The Clerk: What is your full name, sir?

The Witness: John F. Drake.

Direct Examination

By Mr. Verleger:

Q. Mr. Drake, what is your occupation?

A. I am a chemist and a metallurgist.

Q. As a chemist, specifically, have you had any experience testing materials for the presence of salt? A. Yes, I have.

Q. Have you had that experience over a number of years?

A. I have been a chemist since 1917.

Q. Have you made a number of tests for the

(Testimony of John F. Drake.)

presence of salt, say, in different materials within the last 10 years?

A. I have made numerous tests, several hundred, at least.

Q. Did you at a date after March 12, 1956, go down to the harbor area and obtain a sample of earth from any source? A. Yes, I did.

Q. Where did you obtain this sample of earth from? [113]

A. I obtained it from sections of pipe in the yard of the Harbor Department.

Q. Was this dirt that was within these sections of pipe?

A. It was dirt that had been trapped in the pipes.

Q. What did you do with this earth?

A. I took it to the laboratory of Kennard & Drake, the laboratory I own, and made tests on it.

Q. To what tests did you submit it?

A. to tests for the presence of chlorides and sulfates.

Q. Can you state briefly what those tests are?

A. The test for chlorides, the salt was leached out with distilled water, a few drops of nitric acid were added, and then the silver nitrate was added to the filtrates, and a heavy precipitate of chlorides, or a heavy precipitate of silver chloride was found.

Q. Does this result indicate whether or not there was salt in the earth?

(Testimony of John F. Drake.)

A. Yes. It indicated there was a considerable amount of salt in the earth.

Mr. Verleger: That's all.

The Court: May I inquire, when you say "salt" what do you mean?

The Witness: Sodium chloride, common salt.

The Court: Just common salt?

The Witness: Yes, sir. [114]

The Court: You wouldn't be surprised to find salt in the earth adjacent to the seashore, would you?

The Witness: No. You would find some.

Cross-Examination

By Mr. Yoakum:

Q. Where are you employed, Mr. Drake?

A. The laboratory that I own. Our laboratory is at 3364 East 14th Street, Los Angeles.

Q. Do you have any trade name, or just John F. Drake Laboratory?

A. The trade name is Kennard & Drake, K-e-n-n-a-r-d & Drake.

Q. How long have you been so engaged there?

A. Since 1944. At this address since 1951. Prior to that, since 1944, in the same partnership.

Q. When did you go down to the harbor?

A. I believe it was on the 22nd of March, 1956.

Q. Where did you go?

A. I first went to the office of Don Pugh, or of the Pugh Construction Company, met Mr. Don

(Testimony of John F. Drake.)

Pugh, who then took me to the Harbor Department yard and identified the pipe.

Q. Who is Don Pugh? Is that P-u-g-h?

A. P-u-g-h.

Q. Did you say he was of the Pugh Construction Company? [115] A. Yes.

Q. Did anybody else identify the pipe?

A. No, not to me.

Q. What pipe did Mr. Pugh point out to you?

A. He pointed out a section of cast iron pipe, 8-inch diameter.

Q. He told you that this was the pipe that had burst? A. That's right.

Q. Did you observe anything about the pipe that you can remember at this time?

A. Yes. The pipe was a section of pipe with a fairly large hole in the middle, somewhere near the middle. I can't recall exactly where.

Q. How long was it?

A. I would say somewhere around 10 feet or so. I don't remember exactly.

Q. Did you make any measurements?

A. No, I did not.

Q. What did it look like at each end? Describe the ends.

A. One end, I am sure, had a bell. I don't know about the other.

Q. Then what did you do?

A. There was soil that had been washed into the pipe, into the interior of it, and I took samples of this soil. [116]

(Testimony of John F. Drake.)

Q. How did you know that the soil had been washed in? A. By the appearance of it.

Q. Did anybody tell you it had been washed in?

A. No. The appearance of the soil was such that it would indicate that water action had taken place and had washed it in there.

Q. Was the soil wet when you saw it, or dry?

A. It was dry at that time.

Q. Was it powdery?

A. Yes. Well, it was caked, but if you took it in your hand, it would powder up. It was quite dry.

Q. Did you go over to Berth 59 and take any soil specimen?

A. At the time that I was there at this particular time, when I was there at Berth 59, the hole had been covered and I did not take any samples there.

Q. You didn't take any there at any time, did you, at 59?

A. I don't recall whether it was Berth 59 or another spot. Somewhere in that vicinity, I took some samples at another time, so I can't say it was Berth 59.

Q. Do you remember when that was?

A. It was subsequent to this failure.

Q. Did you analyze those? A. Yes. [117]

Q. Did they analyze out the same as this soil that you found in this pipe?

A. Yes. They were heavy in chlorides and sulfates.

Q. With reference to this specimen that you

(Testimony of John F. Drake.)

took from the pipe on March 22nd, did you make a written report? A. I believe I did.

Q. Do you have a copy of it?

Mr. Verleger: Here it is, counsel, if you would like to have it.

The Clerk: Do you wish to mark that?

Mr. Yoakum: May I just look at it a moment?

(Interruption.)

Mr. Yoakum: I think we ought to have this document marked.

The Court: It may be marked.

Mr. Verleger: I have no objection.

The Clerk: I will mark this Defendant's Exhibit H.

(The document referred to was marked Defendant's Exhibit H for identification.)

The Clerk: Also, at this time, your Honor, the other piece of pipe has come and has been marked as Defendant's Exhibit G-1.

(The exhibit referred to was marked Defendant's Exhibit G-1 for identification.)

The Court: I don't think that you told us, or if [118] you did, I didn't get it, where you found the pipe.

The Witness: In the yard of the Water Department, or the ground in the yard.

The Court: It was on the ground, was it?

The Witness: Yes, sir.

(Testimony of John F. Drake.)

The Court: It was not in a shed of any kind?

The Witness: No. I am not sure whether it was on blocks or not. It appears to me it was on the ground.

The Court: It was out in the open, was it?

The Witness: Yes.

The Court: How far from the dock, or how far from the place where the pipe was removed from the ground was it to the place that you found it, that is, in the yard, do you know?

The Witness: I don't recall that. San Pedro Harbor always bothers me a little bit. There are so many ways to get around it. I do know where Berth 59 is, but at the moment I can't tell you where the yards are.

The Court: It is some distance away, though?

The Witness: Yes, it is quite a distance.

Q. (By Mr. Yoakum): Mr. Drake, calling your attention to this report of yours, which is Exhibit H for identification, on page 2 you refer to two numbers here, your lab numbers, or something, 46548, and then underneath that, "Soil from inside of the pipe." [119]

Does that relate to a specimen of soil that you took from inside this pipe that you saw? Is that what that relates to?

A. I believe we broke off a couple of pieces of pipe at that time from the corroded and uncorroded section of the pipe, and the soil was attached to this pipe on the inside.

Q. You took some of the pipe with you?

(Testimony of John F. Drake.)

A. Yes.

Q. Does that number 46548 indicate a lab number of a soil test that you made?

A. Yes. That indicates the number that was given to the pipe, and this is the number that was given to the sample of soil from that pipe.

Q. The soil sample from pipe 46548 was given No. 46547, is that right?

A. I believe so.

Q. Quantitatively, how much soil was involved in this specimen in 46547?

A. You mean the amount we took away or the amount we tested?

Q. The amount you tested.

A. Generally—of course, this is a qualitative test. There was no point in making a quantitative test because of the fact that obviously had been washed into the pipe, so the amount we have used would be a small amount, say, a gram or [120] so, the amount you put on the end of a spatula—that is usually the amount we would use, anyway.

Q. Would you consider that gram of soil would be indicative of the soil in that area of the breakdown at Berth 59?

A. This was fine silt. Yes, I would, for this reason. Water action—of course, chlorides are soluble in water and, therefore, would—washing into that soil would consequently saturate all of it pretty much the same way. We took the soil, mixed it up, and took a gram for analysis.

Q. Would that water action of a large pipe

(Testimony of John F. Drake.)

bursting have any tendency to rid the soil of some things and concentrate it with others?

A. Well, generally, I would consider that the action of the water in this case would be to dilute the amount of salt that was present before the break.

Q. You never did test any of that soil down there and make a report on it, though, from 59?

Mr. Verleger: That is objected to as ambiguous. I am not clear what counsel means by "the soil down there."

The Court: I understand. I don't know whether the witness does or not. If counsel doesn't understand it, it's too bad.

Mr. Yoakum: I want the witness to understand it so we can get a fair answer.

Q. The question is, you never took a specimen from [121] 59 direct?

A. Not at this time, no, sir.

Q. You say you did it later?

A. I cannot recall whether it was from 59 or another area there, because it is a totally unrelated case.

Q. Now, then, with reference to your lab specimen, 46547, you say "chlorides present."

A. Yes.

Q. But you don't indicate any amount of chlorides. What is the reason for that?

A. Well, they were present in quantities that would be not excessively large in that particular

(Testimony of John F. Drake.)

sample, but much larger than you would get in ordinary city water.

Q. You had the same comment here with reference to the sulfates. You said it was present, but you indicate no quantity of it or percentage.

A. No, I do not there.

Q. I take it this next item here in parentheses is soil specimen 46549 taken from pipe No. 46550. Do I correctly interpret that?

A. Yes, that is the way it appears to me.

Q. You say there, without specifying any percentages, "considerable chlorides and sulfates present."

A. That's right.

Q. Now, then, below that you have the comment, "The [122] above tests merely show that chlorides were present in the soil around the pipe; since no quantitative determination would be of value, none was made." Will you please explain what you mean by that last comment?

Mr. Verleger: That is objected to as immaterial, your Honor.

The Court: Overruled.

The Witness: Well, principally the reason that the qualitative test was the only test that would be of value there because of this reason. There is a small amount of chlorides present in ordinary city water. However, that is much less than we found in the sample that we examined, or in both those samples. However, with a flooded area, you would have some leaching of the normal salt content of the soil and, therefore, that doesn't give you any real meas-

(Testimony of John F. Drake.)

ure of the amount of salt that was present in the soil before the flooding by the water that came out of the pipe. That was my reason for not making any further tests.

Q. (By Mr. Yoakum): Do you know, Mr. Drake, the source from which that water came that came out of that pipe that day?

A. No, I don't.

Q. Are you familiar with the content of the Metropolitan Water District water, Colorado River water? [123]

A. Yes. I have made—I don't know whether it is Colorado River or the mixed water. I have made tests on that on numerous occasions.

Q. The mixed water, is that the water for drinking purposes?

A. The ordinary drinking water, yes.

Q. Do you know how that rates with respect to chloride contents?

A. I don't know, because I don't know whether we get water from the Colorado River at times, or whether most of the water is from the Sierra watershed, or whether they are mixtures, and they would vary naturally.

Q. Just assuming that the water was Colorado River water, what would you say with reference to the chloride contents of it?

A. I have never made any test of Colorado River water as such, that I could say was Colorado River water alone.

Mr. Yoakum: Your Honor please, at this time

(Testimony of John F. Drake.)

we move to strike all the testimony of this witness with respect to this analysis of this soil on the ground that no proper foundation has been laid, in that it was just hearsay, pointing out to him the pipe and, furthermore, the soil specimen was taken from this pipe at least 10 days after the incident here, and the pipe had been removed and had been left outside. There is no basis at all for showing that that was the soil that was in [124] that pipe when it was taken from the outside of 59.

The Court: Denied. I think it is up to the Court to decide, or to pass upon the testimony. One of the things the Court will have to consider, I think, is the testimony of this witness as to the time and how he got the specimen.

Mr. Yoakum: I have finished with Mr. Drake.
your Honor.

The Court: Any other questions?

Mr. Brennan: No.

Mr. Wood: No.

Mr. Verleger: No questions.

The Court: May this witness be excused? If he needs to come back, he can come back.

Mr. Wood: You don't want this witness, do you?

Mr. Yoakum: No. I think this report ought to remain here.

The Court: It is marked for identification. It will remain with the clerk until this case is all over with.

Mr. Drake, you may be excused.

(Witness excused.)

Mr. Yoakum: Your Honor please, as G-2, we would like to have this section marked for identification.

The Court: It may be marked for identification G-2 only.

The Clerk: G-2 for identification. [125]

(The exhibit referred to was marked Defendant's Exhibit G-2 for identification.)

The Court: Call your next witness.

Mr. Yoakum: I want to know if we may have these two, G-1 and G-2, in evidence without bringing Mr. Brashier back again. It is obvious that they match up, but if you want him, he is here.

Mr. Verleger: No argument, your Honor.

The Court: All right. G-1 and G-2 may be received in evidence.

The Clerk: G-1 and G-2 received in evidence.

(The exhibits heretofore marked Defendant's Exhibits G-1 and G-2 were received in evidence.)

Mr. Verleger: Your Honor, I would like to read next the answers to certain supplemental interrogatories.

The Court: Will you tell me when they were filed?

Mr. Verleger: Your Honor, I have to find them. They weren't here. I thought they were. The answers were received by us September 26, 1958. I would assume they were filed on or about the 24th of September.

Mr. Yoakum: September 26th, your Honor, according to our stamp.

The Court: "Answers of City of Los Angeles to Plaintiff's Supplemental Interrogatories," is that right?

Mr. Verleger: Yes, your Honor. [126]

The Court: All right.

Mr. Verleger: Your Honor, Interrogatory No. 1:

"State whether or not there was any water meter or water meters connected to the water line or to the main supplying said water line, from which the water escaped in the present case, particularly including any detector meters, on the line or lines connecting the Water Department main in Signal Street with the Harbor Department sprinkler main in Signal Street."

Answer: "Yes."

"Interrogatory No. 2

"State whether or not any person read said meters, or any of them, at any time.

"Answer to Interrogatory No. 2

"On information and belief I am informed that By-Pass Meters (sometiems called detector meters) were read by an employee of the Department of Water & Power.

"Interrogatory No. 3

"Were any of said water meters read within the three months next preceding March 12, 1956?

"Answer to Interrogatory No. 3

"Yes.

"Interrogatory No. 4

"If the answer to Interrogatory No. 3 is

‘yes’, [127] state:

“(a) The name, description and location of each said meter”;

The answer to Interrogatory No. 4 is:

“(a) Service No. 2690—a 1-inch Hersey By-Pass Meter, No. 1350948, located near Berth 60 and about 5 feet east of the west line of Signal Street.

“Service No. 2692—a 1-inch Hersey By-Pass Meter, No. 13509444, located near Berth 58 and about 4 feet east of the west line of Signal Street.

“Service No. 8849—a 1-inch Hersey By-Pass Meter, No. 1350937, located near Berth 57 and about 4 feet east of the west line of Signal Street.

“(b) On information and belief I am informed each of these three meters was read by an employee of the Department of Water & Power on January 7, 1956, two of them were read on February 4, 1956, and the third (Service No. 8849) was read on February 9, 1956, and all three of them were read March 1, 1956.”

Interrogatory No. 4. “(c) The manner in which [128] the reading was recorded, if it was so recorded;”

The answer is:

“(c) On information and belief I am informed that the readings were recorded on the Automatic Sprinkler Service Records of the Department of Water & Power.”

Interrogatory No. 4. “(d) The person to whom the meter readings were given and the use made of them, if any.”

The answer is:

“(d) On information and belief I am informed the meter readings were given to someone in the billing department of the Department of Water & Power and thereafter bills were submitted to the accounting department of the Harbor Department.”

I am going to skip (e) unless somebody wants it.

Mr. Yoakum: Omit it as far as the city is concerned.

Mr. Verleger:

“Interrogatory No. 5

“State whether any records exist of the reading of said meters during any of the said period.”

The answer is “Yes.”

“Interrogatory No. 6

“State whether, upon the reading of said meters, any flow of water was indicated. [129]

“Answer to Interrogatory No. 6

“On information and belief I am informed that on some of the occasions in question a flow of water was indicated.

“Interrogatory No. 7

“If the answer to Interrogatory No. 6 is ‘Yes,’ state:

“(a) The date when said flow was indicated;

“(b) The rate and amount of said flow;”

The answer to (a) is:

“On information and belief I am informed that the flow was indicated during the period of a portion of the period approximately 30 days preceding the reading of the meters.

“(b) The amount of the flow was as follows (measured in 100 cu. ft.):

Date of Reading	Service No. 2690	Service No. 2692	Service No. 8849
1/7/56	25	8	1
2/4/56	38	6	
2/9/56			1
3/1/56	29	5	None”

The Court: May I inquire, did any of the witnesses identify the place where the water went into the building by a service number? [130]

Mr. Verleger: Your Honor, as I understand it, these meters are located between the 10-inch line and the 8-inch line, so that there is no service number that would appertain to a particular building. In other words, the meters measure the flow through the three lines into the entire 8-inch line, and then from the 8-inch line separate lines take off.

The Court: Then this is the flow from the 10-inch line into the 8-inch line.

Mr. Verleger: That's right. The 8-inch line in turn supplied the sprinkler system and the hydrant system for the entire area.

The Court: So this is the amount of water that was used in the entire area?

Mr. Verleger: That is correct, your Honor.

The Court: All right.

Mr. Verleger: That is the sole portion of these interrogatories we propose to offer.

Mr. Yoakum: Just a moment. You stop here at one that explains this flow, which leaves it hanging in the air. You ought to read it.

The Court: I think at least you ought to continue with the entire interrogatory and not leave off in the middle of the interrogatory.

Mr. Verleger: Your Honor, it breaks into various parts. The difficulty is, I am willing to accept the City's [131] figures, but I have no particular confidence in their explanation and, therefore, I am not willing to offer it on our behalf. I am perfectly willing to read it for Mr. Yoakum, if he wishes.

Mr. Yoakum: That isn't the criterion, whether he has confidence in the answer or not. It is whether it is relevant to something that precedes.

The Court: Well, I think you better read the explanation. I am going to get the explanation anyway. I will either get it this way or from a witness.

Mr. Verleger: As long as it is understood that we are not vouching for it, your Honor.

The Court: I understand you are not vouching for it.

Mr. Verleger: The question is:

"(c) The cause of said flow, if it was established;"

The answer to that is:

"(c) There are various causes for the flow. There was about 6000 feet of underground pipe on this one fire prevention system and in said pipe there were about 600 leaded joints or about 10 leaded joints per 100 feet. Some of the causes, but not necessarily all, are as follows:

"1. Minor leaks in the joints. [132]

"2. There were 36 2-inch drain valves which sometimes leak and are sometimes turned on when working on the system.

“3. There were 36 $\frac{3}{4}$ -inch inspector’s test valves which are used for testing whether the fire system is working and whenever these test valves are turned on a flow may be registered through the By Pass Meters.

“4. Improper seating of the alarm valves.

“5. If there is a surge in the pressure the alarm valves will open and the water will go into a closed drain. The water mentioned in explanations 2 and 3 also goes into the same closed drain and is not apparent.

“6. Longshoremen or other persons will sometimes ‘skylark’ by turning on the fire hoses that are present in the transit sheds merely for the fun or thrill of seeing water under pressure. There were 36 fire hose valves in the system on March 12, 1956.

“(d) What, if anything, was done to stop said flow;”

“(d) As leaks became known they would be repaired, [133] and when valves were found turned on they would be turned off, or if observed leaking they would be repaired.”

“(e) Whether such measure was successful in stopping said flow.”

“(e) Stopping the flow was successful when a leak was discovered and repaired or a turned-on faucet was found and closed.”

The Court: Do you want any other part of the interrogatories read?

Mr. Yoakum: I don’t think so, unless counsel does.

Mr. Verleger: Your Honor, counsel for the City has kindly furnished us photostats of the City's records, first, of the Water Department with respect to the measurements of these valves, and, second, through the Harbor Department building records. I have made photostats of the photostats and I would like to offer those at this time.

Mr. Yoakum: Please offer one at a time, because I have different objections to different documents.

The Court: Do the records show any difference between those and statements made by the witness? Is it just cumulative? The witness testified as to the amount of water.

Mr. Verleger: It is probably all cumulative with the single exception the Harbor Department records show they were billed for this flow and would therefore have known it [134] was going on. I wasn't sure that that was quite clear in the interrogatory. I would offer that alone, perhaps.

Mr. Yoakum: We have no objection to the billing that was received by the Harbor Department for these meters, if that is what you mean.

Mr. Verleger: I think the Harbor Department accounting records are clearer.

Mr. Yoakum: That's all right. Offer both of those, if you want.

Mr. Verleger: In addition, your Honor, I would also state this further for the record, that is, that these records do go back further than the answers to the interrogatories and show a flow for a longer

period of time. To that extent, they are not merely cumulative.

The Court: Do you have any objection to them going in the evidence?

Mr. Yoakum: If they will just specify what he is putting in first here. There is no objection to the Harbor Department accounting division records.

The Court: They may be received in evidence.

Mr. Yoakum: No objection to the bills going in.

Mr. Verleger: The next would be the records of the City Water Department, the readings of the sprinkler system meters.

Mr. Yoakum: We object to the readings of the City [135] Water Department on these meters on the ground they are immaterial. They are documents peculiarly belonging to the autonomous group known as the Department of Water & Power and they are their interdepartmental records. They are not brought to our attention other than as billings are submitted to us, and they are way too remote in time. They go back several years.

The Court: Overruled.

Mr. Yoakum: But the main objection is that they are the records of an independent autonomous department within the city, and hence not binding or material in any way insofar as the Harbor Department is concerned.

The Court: Overruled. They may be received in evidence.

Mr. Verleger: Your Honor, it is approximately three minutes to 4:00 o'clock. Should I start another witness?

The Court: No. We will start our recess when we have these marked.

Mr. Verleger: That's all we have.

The Clerk: Plaintiff's Exhibits 21 to 27, inclusive, are marked for identification and entered into evidence.

The Court: Before we recess for the afternoon, there is a problem I want to discuss with counsel. This is not the first time or this is not the first case where I have had similar problems. There is evidently an attempt being [136] made by the defendants to designate or keep separate and apart the City of Los Angeles and the Harbor Department.

On the other hand, there is an attempt on the part of the defendants to show that Grace & Company and Grace Lines, Incorporated, or Grace Lines Corporation, are one and the same party.

I have handled a number of anti-trust cases involving theatres. In all those anti-trust cases, we always have Fox, Fox West Coast, Fox Distributing Corporation, Fox Exhibiting Company, and Fox this and Fox that, and so forth, and so on, so it was very difficult to try to keep a distinction between these various corporations.

Finally, I just decided to call Fox Fox and let it go at that. The Circuit sustained me on that contention. I didn't try to distinguish.

Now, this is a case that is brought against the City of Los Angeles, the Outer Harbor Dock & Wharf Company, and also the Harbor Department. The testimony so far has been that these water lines

were owned by the city. They were serviced by city water. The maintenance was by the city.

So when we come to the other question of Grace Lines, Grace Incorporated, Grace & Company, I am going to have to decide whether I am going to try to meticulously keep a distinction between these various corporations, or whether I am just going to regard them as Grace. [137]

Then there is the question whether I am going to meticulously try to make a distinction between the different organizations within the city, or just going to collectively call them the City.

Now, I assume that there is plenty of authority to the effect that these various organizations should be kept separate and apart, and that notice to one is not notice to the other, and the action of one does not apply to the action of the other.

We have got here an action against the City of Los Angeles. We are dealing with a pipe line that was built by the City of Los Angeles, serviced by the City of Los Angeles, water was placed in there by the City of Los Angeles, and the water that escaped belonged to the City of Los Angeles.

I don't know whether it is going to be necessary for me to make a distinction or not. I would like to hear from the other attorneys, because they are just sitting back there and letting the City carry the burden. So far the City has done all the questioning. They are carrying the burden of this lawsuit. The others are just going along for the ride.

Mr. Yoakum: If your Honor please, so far as the City situation is concerned——

The Court: Will you talk so we can hear you, if you are going to talk at all? [138]

Mr. Yoakum: So far as the city is concerned, I think that it is exceedingly advisable, so that the record will be clear in this case, that you keep the different departments separate. I think your Honor has read the briefs, or a good portion of them.

The Court: I have read every word in your briefs.

Mr. Yoakum: Thank you. It is our position, as you know, that we were engaged in a governmental function in connection with this apparatus or property that gave way down there, and in order that we can be held liable, if it is a governmental function, certain requirements of law must be met. I don't think anybody gainsays that. They challenge our contention, although they admit it was for fire fighting, they deny it is a governmental function. We will get to that later on.

But I think for the purpose of keeping a good record here, it is very definitely advisable to keep separate the functions of the Water Department and the functions of the Harbor Department, because if we are correct on our position that this is a governmental function, why, the plaintiffs have an entirely different and additional burden to sustain before there can be any liability. So insofar as the two departments of the city are concerned, I respectfully suggest and request that you do maintain separate references to them.

The Court: I am going to treat the plaintiff and [139] the defendant exactly alike. If I keep

these corporations or business activities separate and apart, I am going to keep the Grace activity separate. We have got several Grace organizations here. This is brought in the name of Grace & Company, a corporation. That may not be the steamship line. I don't know. I don't know what the story is going to be. But if I keep a distinction as far as the activities of the City are concerned, I am going to keep that distinction as far as Grace Lines are concerned.

Mr. Yoakum: I have no comment about that.

The Court: I think somewhere in the briefs I read something about the alter ego of one and the other.

Mr. Yoakum: I think the evidence will probably show that Grace Line, Inc., which entity was the preferential assignee of this Berth 59, was acting as the agent of Grace & Co., the plaintiff here, in putting that cargo into that transit shed. If you wish to keep them separate for the purpose of the record, I have no quarrel with that. I am very interested in trying to have you do it with reference to the two departments.

The Court: I raised the question primarily because there was some argument in the briefs relative to the different Grace Companies here.

Mr. Verleger: Your Honor, may I be heard briefly on these questions? [140]

The Court: Yes.

Mr. Verleger: First, so far as the city is concerned, I think that the record will show negligence pre-eminently on the officers of the Harbor Depart-

ment. To that extent, I don't think the court will find the problem of distinguishing the two particularly acute, because so far as I can see, there seems to be no question but that their employees did not maintain, that is the essence of it, what they were charged with maintaining, the particular section of the pipe that failed.

Likewise, the evidence we have just admitted shows clearly there was leakage from the pipe prior to the event in question, and knowledge of this was brought home to the Harbor Department.

So, actually, the distinction, so far as the city goes, seems to be material only in this one content. If the activities of the City are proprietary, then under the authorities we have cited, it seems to be very clearly that running a dock is proprietary.

Likewise, under the case that we have cited, it seems to be very clear that the lateral of a water system which supplies water for a sprinkler system is proprietary. Then there is no need for us to prove specific notice.

I think this is what counsel had in mind when he says there is a great distinction between proprietary and non- [141] proprietary activities. There is no need for us to prove notice in perhaps quite the same sense as you have to against a governmental activity. In that context, all we have to show is that the City taken as a whole was negligent and that we are entitled to recover.

If this is a government activity, then one has to fall under the provisions of the government code which say that notice must be brought home to the

department charged with making the repairs. Actually, in the present case, I don't think that is going to cut a great deal of ice either. The reason I say that is simply this. We think the evidence of negligence that will be produced will be such as to show simply from the physical circumstances that existed there at the dock any competent engineer would know that failure was about due to happen, and under the authorities, we think that is quite clearly sufficient notice even if you are dealing with a governmental entity.

So that I don't think any context can arise in which the distinction between the Harbor Department and the Water Department is going to cut very much ice in this case. In other words, I just don't think this is that kind of a case.

Now, so far as Grace Line is concerned, I think the evidence will show that Grace & Co., Pacific Coast, is a corporation in the importing business. Grace Line, Inc., is a corporation in the steamship business. The dock here is used [142] by the steamship line through Outer Harbor Dock & Wharf under the terms of a preferential assignment for the discharge of cargo from the ship and the placement of it there until consignees pick it up.

For this, the city actually collects a fee, mostly from the preferential assignee, sometimes from the consignee.

The person who owns the goods placed on the dock, whether he be Grace & Co. (Pacific Coast) or John Doe, has no contract with the city for this purpose, any more than when I walk into Robin-

son's Department Store, I have a contract with the person who may have leased the store to the owner. But, nevertheless, when the City turns the dock over to these parties, they do so for the purpose of having it used in this connection and are liable to the people thus invited into the property for negligence in maintaining the property.

The only context, so far as I can see, in which a distinction between Grace Line and Grace & Co. (Pacific Coast) has any significance is this. The City has an ordinance which says, "We are not liable for leakage from sprinklers," for a couple of other specific things, "in any cause for which we are not made absolutely liable by law." I am not quoting it precisely, but doing as well as I can from memory. They seemingly do not maintain that we are bound by the thing simply as an ordinance, I suppose recognizing that the law in this state is clear that the City cannot make an ordinance [143] limiting its liability. They do maintain, seemingly, it has validity as a matter of contract, and the way they get there is this. The berth assignment says that the berth assignee agrees to be bound by the charter of the City of L. A., by the regulations and the ordinances made by the city and the Harbor Department pursuant thereto. They say that is a contract incorporating an exculpatory clause, and that Grace Line, Inc., is bound by this contract under the terms of its berth assignment, and because W. R. Grace & Co. is the same thing, it would be bound. To that it seems to me there are three answers. The first is that an exculpatory contract, a contract

incorporating ordinances palpably incorporates only valid ordinances. The second is that in any event it would be a contract with Grace Line, Inc., only in its capacity as a steamship operator. There would surely be no intention, even if Grace Line, Inc., had some goods of its own on the ship, that these would apply to it as a consignee when they don't apply to any other owner of cargoes.

So that again in this context I don't think the Court is apt to reach the problem of having to determine whether these entities are one and the same. Nevertheless, so that the Court will be clear on what the companies are, we will offer some evidence briefly on that subject before we conclude. [144]

The Court: I want the parties to know I am going to treat you exactly the same, and if you make an argument one way for the plaintiff, I am going to apply that argument on the defendant. I am not going to blow hot and cold. I am going to be consistent in my rulings.

Mr. Wood: May I be heard for one moment?

The Court: Yes.

Mr. Wood: I represent Grace Lines, Inc. I would like to point out what I think is a very definite distinction here. Grace Lines, Incorporated, the preferential assignee and the owner and operator of the steamship upon which this cargo came to the pier, was not an original party to this action. There is no issue as between plaintiff and defendant Grace Lines, Inc. We are in this action only because Outer Harbor, who is a defendant, claims

that we should indemnify them for any loss which they may sustain by reason of the contract existing between those two parties.

Now, the city alone has raised this issue of the duplication of interest here as a matter of defense as against the claim of the plaintiff. It seems to me it goes in the final analysis, I mean their point is that by reason of the preferential assignment of Grace Lines, Incorporated, some notice or a binding contract provision was rested upon the plaintiff here. That, it seems to me, is completely the City's burden to establish, and not for the plaintiff or for [145] Grace Lines, Inc., who is not interested except vicariously in the fundamental dispute here. It is not for us to disprove. Grace Lines, Incorporated, has no interest in that particular phase of it. We frankly have no interest in whether or not the plaintiff prevails.

The Court: I just wanted to bring this matter to your attention so you can be thinking about it, anyway.

Court will now stand in recess until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m., Wednesday, October 8, 1958.) [146]

Wednesday, October 8, 1958, 10:00 A.M.

The Court: You may proceed.

Mr. Brennan: If your Honor please, I believe there has been an agreement here that will eliminate

some of the issues, and certainly some of the parties to this lawsuit. I believe it has been agreed by all parties concerned that the plaintiff will dismiss its complaint as to Outer Harbor, also known as Uni-harbor, with prejudice.

Secondly, Outer Harbor will dismiss its third party complaint against the Grace Line with prejudice.

Thirdly, that Outer Harbor will dismiss its counterclaim against the plaintiff with prejudice.

Fourthly, that Outer Harbor will dismiss its cross-complaint against the City, but without prejudice to any other action now pending.

Fifthly, that the dismissals are to be without costs, that is, none of the parties are to receive costs, and that these dismissals are not to constitute or to be regarded as a release of a joint tort-feasor.

Mr. Verleger: So stipulated.

Mr. Yoakum: So stipulated.

Mr. Wood: So stipulated.

The Court: Such may be the stipulation.

Mr. Wood: I think the order should include, your [148] Honor, a dismissal of Grace Line, Incorporated's cross-complaint against the City of Los Angeles, which should be without prejudice, since it is a contingent claim over against the City. It should be without prejudice because there is other litigation pending arising out of this incident.

The Court: Is there any objection to dismissal?

Mr. Verleger: None on our part, your Honor.

Mr. Yoakum: No.

The Court: The dismissal may be granted.

The Clerk: Will the plaintiff prepare some type of order?

The Court: Will you prepare an order?

Mr. Brennan: I think we will have time to get that out. The others will be busy. We will prepare the orders and have them submitted.

The Court: Call your next witness.

Mr. Verleger: Will Mr. Wakeman take the stand, please?

CARROL M. WAKEMAN,

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, sir?

The Witness: Carrol M. Wakeman.

Direct Examination

By Mr. Verleger:

Q. By whom are you employed, Mr. Wakeman? [149]

A. City of Los Angeles, Harbor Department.

Q. Were you so employed on March 12, 1956?

A. Yes.

Q. For how long before that time had you been so employed?

A. Approximately thirty years.

Q. What is your position with the City of Los Angeles?

A. Testing engineer.

Q. How long had you held that position?

A. About the same time.

(Testimony of Carrol M. Wakeman.)

Q. Are you a licensed engineer?

A. I am.

Q. In that capacity was it your duty to test materials and determine the strength of materials for various uses by the City of Los Angeles?

A. Yes.

Q. As an engineer were you prior to March 12, 1956, familiar with the existence of corrosion in cast iron pipe?

A. Yes.

Q. Were you aware that such corrosion was most common in soils containing chlorides commonly found near the ocean?

A. Yes.

Q. After this episode of March 12th, were you asked to examine the piece of pipe which was involved in the failure [150] by Mr. Brashier?

A. No.

Q. Were you asked to examine it by someone else employed by the City?

A. Not that I recall.

Q. Did you examine the piece of pipe?

A. Yes.

Q. At any rate, you did examine the piece of pipe which was involved in this failure, is that right?

A. Yes.

Q. Did you determine that the failure in question was caused by graphic corrosion?

A. No.

Q. Did you conclude that it was due to graphic corrosion?

A. Yes.

The Court: Did you form any opinion as to what caused the failure?

(Testimony of Carrol M. Wakeman.)

The Witness: Yes.

The Court: What is your opinion?

The Witness: Well, I thought that it was graphitic corrosion that took place.

The Court: You thought it was corrosion?

The Witness: Yes.

The Court: The failure was caused by corrosion? [151]

The Witness: That is the way it looked. You see, the pipe was broken off when I saw it, and I didn't see it until several months after the break. The pipe was removed from the original location. I didn't see any part of the pipe at the time, at or near the time of failure, so I think it was the following, well, either a month or two months after that before I saw it, and then it was in little pieces, so it was very difficult to tell just what had occurred, because the pipe had been broken in removal and altered, and I wasn't sure of where the original break was in the first place. It was pointed out to me, but I wasn't sure of that.

Mr. Verleger: No further questions, your Honor.

Cross-Examination

By Mr. Yoakum:

Q. As a part of your duties as testing engineer, has it ever been your duty to test pipe, water pipe that was buried in the ground? A. No, sir.

Q. You say you are a testing engineer. What are your duties in that connection?

(Testimony of Carrol M. Wakeman.)

A. Primarily our department is charged with the testing of materials for acceptance for specified jobs, that is, to make sure that the materials are of the qualities that are specified, new materials. [152]

Q. You, of course, weren't with the Harbor Department at the time this pipe was installed?

A. No.

Q. In 1914? A. No.

Mr. Yoakum: Nothing further.

Mr. Verleger: Nothing further.

Mr. Yoakum: May this witness be excused?

The Court: May he be excused?

Mr. Verleger: Yes, as far as I am concerned.

The Court: You may be excused.

(Witness excused.)

Mr. Verleger: Next, your Honor, I wish to offer the answers to certain interrogatories which were filed—well, they were subscribed and sworn to on the 25th of June, 1957, and we received them on July 17th. My file copy doesn't show the filing date.

Mr. Yoakum: July 15, 1957.

Mr. Verleger: Your Honor, the answers that I am referring to commence in the lower part of page 3, and run through to the conclusion of the answers. They ask the City to enumerate the failures it has experienced with cast iron pipe within certain areas. There are a large number of such instances enumerated, and it would be my request that we offer the document itself, rather than attempt to read

this [153] list into the record, which would take a considerable period of time.

Mr. Yoakum: May I make a statement?

The Court: Yes.

Mr. Yoakum: We have no objection to the suggested course of procedure in the interest of economy of time, but we object collectively and severally to each and all of these answers on the ground that they are wholly immaterial here. These answers, if your Honor please, relate to the experience of the Department of Water & Power. They do not relate at all to the experiences of the Harbor Department.

It is our position that the experience of the Department of Water & Power with reference to its pipes has no materiality and is not germane to the question of whether the Harbor Department has been negligent in any way or whether there has been any notice to it.

Now, clearly, under the authorities, if this is a governmental function with which we are here dealing, the notice to the Department of Water & Power would be wholly immaterial under the public liability statute, because it is not notice to a person charged with remedying the condition. Furthermore, we submit that in the case of a large municipality, or any large political entity, notice to one branch is immaterial to prove notice to a completely separate autonomous branch. For that reason we object to any of these Ashline answers. Mr. Ashline is the corrosion [154] engineer of the Department of Water & Power.

The Court: Now, counsel, I might agree with you, but, however, I am not ready to rule at this particular time, so I am going to overrule the objection. I may agree with your theory in law, but at this time I am not ready to make such a ruling, so I am overruling your objection and will allow the answers to be admitted as an exhibit in this case.

Mr. Yoakum: May I add one additional ground there? We think with reference to many of these items they are too remote. In other words, they are not on this street at all.

The Court: I think that is for the Court to evaluate. Of course, I may be wrong, but it is my opinion where you are adjacent to the ocean you have a penetration of salt from the ocean. I don't know how far it goes back. I imagine it is more concentrated right on the shoreline than it is away from it a half-mile, but I would assume there is a concentration of salt from the ocean regardless of where the ocean is. So I think that is something for the Court to evaluate. I will overrule the objection.

Will you please come up here and be sure we get the right ones marked, because I think I had the wrong copy.

Mr. Verleger: Yes. It starts with page 3 here.

The Clerk: Plaintiff's Exhibit 28 in evidence. [155]

(The document referred to was marked Plaintiff's Exhibit 28, and received in evidence.)

Mr. Yoakum: Of course, some of that other has been already read in.

Mr. Verleger: Your Honor, there is attached to the interrogatories which we have just placed in evidence a corrosion map of the City of Los Angeles. I think in order to avoid the problem of taking apart the file at this time, we have a copy, and if counsel has no objection we will place that on the blackboard for use at this time.

Mr. Yoakum: The objection will be the same as that announced with respect to the interrogatories, but you have overruled me. That was part of the answers so we have no objection to using another copy for facility on the board. Is that going to be given a separate number?

Mr. Verleger: My thought is unless it is necessary to mark it, and I trust it will not be, we will just use the copy.

Mr. Yoakum: My thought would be that you will be referring to it with some witness, and I think it ought to have some kind of a designation.

The Court: Let's give it a number, 28-A.

The Clerk: 28-A in evidence.

(The document referred to was marked Plaintiff's Exhibit 28-A, and received in evidence.) [156]

The Court: And 28-A is exactly the same kind of map as is attached to Exhibit 28?

Mr. Yoakum: Yes, your Honor.

Mr. Verleger: Now, Mr. Ashline, will you please take the stand.

ROBERT R. ASHLINE,

called as a witness on behalf of the plaintiff, under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: You may take the witness stand, please, and will you state your name, please?

The Witness: Robert R. Ashline.

The Clerk: Will you spell your last name?

The Witness: A-s-h-l-i-n-e.

Mr. Verleger: Preliminarily, your Honor, I should state with respect to Mr. Ashline that counsel and I have stipulated whereas Mr. Ashline has to get away at least tomorrow some time, therefore, in addition to cross-examing within the scope of the direct, it has been stipulated counsel can cover matters that would be properly within his direct.

Mr. Yoakum: So stipulated.

Direct Examination

By Mr. Verleger:

Q. Mr. Ashline, by whom are you employed? [157]

A. The Department of Water & Power of the City of Los Angeles.

Q. For how long have you been employed by the Department of Water & Power of the City of Los Angeles? A. Since June 25, 1924.

Q. What is your position with the Department of Water & Power?

A. I am corrosion engineer of the water sys-

(Testimony of Robert R. Ashline.)

tem. We have two corrosion engineers, one for power and one for water.

Q. Is that the position you held throughout this period time?

A. No. I have held this position since 1935.

Q. Do you have numerous employees under your supervision working for the City?

A. Yes, I do.

Q. Approximately how many? A. Six.

Q. You direct them in their work in this corrosion field? A. Yes, sir.

Mr. Verleger: Your Honor, I wish to call this witness under 43(b) as an adverse witness.

Mr. Yoakum: We would object on the same grounds we objected to the other day to calling Mr. Brashier. This man is clearly not—— [158]

The Court: Overruled.

Q. (By Mr. Verleger): Now, Mr. Ashline, I am going to refer to Exhibit 28-A in evidence. Did you prepare this map?

A. I had it prepared.

Q. You are familiar with the data contained on it, is that right? A. Yes, sir.

Q. Now, there is a legend Soil Corrosivity Indexes for Cast Iron Pipe, and then there is severe, moderate, mild, slight. A. That's right.

Q. Can you tell us first what you mean by a severe corrosivity index for cast iron pipe?

A. Yes. In testing soils we have instruments that measure the resistivity, the electrical resistivity of the soil. The magnitude of the readings that we

(Testimony of Robert R. Ashline.)

observe indicate the severity of the corrosion. It has been set up through testing experience to arrive at a point where we either decide on protecting the pipe or not protecting it.

Q. Then, so I am clear as to what you said, soil which has a certain electric resistance or lack of it is more corrosive so far as cast iron pipe goes than other soil, is that the situation?

A. The lower the resistivity or the higher the conductance [159] of the soil, the more severe it is corrosion-wise.

Q. Just so I understand, if more electricity will pass through the soil and there is less resistance to the passage, the soil is more corrosive as far as pipe is concerned, is that it? A. That's right.

Q. Do each of these represent some certain degree of electrical resistivity then which in turn is correlated with pipe? A. Yes.

Q. Starting first with severe, what is the corrosion there?

A. From zero to 1,000 ohms per c.c.

Q. So if soil has a resistance from zero to 1,000 ohms per c.c., it is considered severely corrosive, is that right? A. To cast iron.

Q. To cast iron. A. Yes.

Q. And similarly, if it is moderate, why, that in turn represents some degree of resistivity?

A. 1,001 to 2,500.

Q. And if it is mild, that represents what?

A. From 2,501 to 5,000.

(Testimony of Robert R. Ashline.)

Q. If it is slight, that in turn would be a different [160] figure? A. 5,000 to infinity.

Q. Are these figures based on some sort of research and experience as to what conditions actually tend to cause the corrosion in cast iron pipe?

A. Yes, sir.

Q. The City has conducted tests in that connection, has it?

A. The Los Angeles Water System has, and practically all the gas companies and oil companies have combined their research.

Q. These tests have been going on for a great many years?

A. Not a great many, but for the past twenty years.

Q. That would take them back to 1939?

A. I would say maybe a few years before that.

Q. In point of fact, you were actually carrying on tests well before that date, were you not?

A. I would say 1935 it really started.

Q. And tests of the same sort have been carried on by the United States Government and publications made about them? A. Yes.

Q. And likewise published in the engineering literature, and so on? [161]

A. That's right.

Q. Just so I am clear on the precise coloration, there is an area down here that is marked transit shed No. 59, and that bears a rather light color.

A. That is severe.

Q. That is marked severely corrosive?

(Testimony of Robert R. Ashline.)

A. Wherever it is pink in color or red—it is supposed to be red, but it is a little light.

Q. And this entire Pier 1 area is so colored, is that right? A. That's right, sir.

Q. For how long has the City had these maps?

Mr. Yoakum: You mean the Water Department? If you are going to use the word City, I am going to object. I don't see why you won't use Water Department so that we will know and the witness will know and the Court will know what you are referring to.

Mr. Verleger: In order to accommodate counsel, I will be glad to rephrase the question.

Q. I take it these maps are kept in files that are under your general supervision, is that right?

A. That's right.

Q. How long have you had them?

A. These maps have been in the process of being completed since about 1935. In other words, data is gathered, additional [162] soil test data is gathered, and it is added to our maps, and gradually they are expanded out in all areas.

Q. Generally speaking, areas which have any sort of salt water intrusion tend to be highly corrosive, do they not?

A. No, sir. You will notice a red area extends a long way from the salt water line there.

Q. May I ask you, do you recall, Mr. Ashline, we took your deposition on December 13, 1957?

A. Yes.

Q. Do you recall at that time you testified——

(Testimony of Robert R. Ashline.)

Mr. Yoakum: May I please see it?

Mr. Verleger: Yes, sir.

Mr. Yoakum: Is the original on file?

Mr. Verleger: I believe so.

Mr. Yoakum: There is no objection as far as we are concerned to referring to the copy counsel has.

Q. (By Mr. Verleger): The question is—do you want to take a minute to read through this?

A. (Witness complying).

Q. “Q. There are areas, are there not, right down by the bay in San Pedro which have a good deal of salt, in the sense of sea water or salt from sea water, in the soil, is that true?

“A. That is true. [163]

“Q. I gather from what you have said that generally such areas fall in the highly corrosive category, is that right?

“A. Generally, they do.”

A. Yes.

Q. So that again you repeat generally such soils do have, that is, the soils that do have salt fall in this highly corrosive category, is that right?

A. That's right.

Mr. Verleger: No further questions, your Honor.

The Court: I would like to ask the witness a question. What causes one length of cast iron pipe to corrode and another length not to corrode in the same area?

The Witness: This particular pipe made in 1914 was made with a sand cast lining. In other words, it was sand cast pipe. That is the way they were

(Testimony of Robert R. Ashline.)

making pipe at that time. In the process of manufacture it forms a skin from the sand. The molten sand forms a very hard skin on the surface of the pipe, and if that skin is broken during transit, or somebody accidentally hits it with a shovel, or if they should pull a chain over it while trucking it on the truck or rolling it off the truck to the trench site, or drop rocks on it when they are backfilling, if that skin is broken, the corrosion starts at the break of that skin, and in graphitic corrosion once it starts the progress [164] continues depending upon the resistivity of the soil.

The Court: Then I understand you take a length of pipe and if there has been an injury on any part of that pipe, that is, in any part of the length of the pipe either by a blow or any other kind of injury, that corrosion will take place at the point of the injury and not the rest of the pipe, is that right?

The Witness: That's right, because there is a protective film from the high silica skin on the surface of the cast iron pipe.

The Court: From the testimony in the case before the court so far the hole in the pipe was about as big as the palm of your hand. A certain length of pipe was cut out and replaced. Evidently, I suppose the pipe that was replaced was considered in good condition. Would you say it is your opinion that the corrosion was caused by some injury to the outer skin of the pipe?

The Witness: It could have been, yes.

(Testimony of Robert R. Ashline.)

The Court: Could have been. Well, could it have been caused by anything else now?

The Witness: Through studies, we have found that has been the principal cause.

The Court: This injury to the skin of the pipe could have occurred at any time after manufacture?

The Witness: That's right. [165]

The Court: Either in transportation or installation?

The Witness: That's right.

The Court: This injury in the skin of the pipe would have to be of such extent it would be readily visible, or would it be kind of a latent injury?

The Witness: More of a latent injury. I don't believe you would be able to even notice it with your eye unless it would be a real scarred mark from the chain. It would have to be a pretty deep scar.

The Court: The ordinary workmen in installing the pipe would not probably have noticed a slight injury to the skin, and a slight injury would cause corrosion?

The Witness: That's right.

The Court: You probably want to ask some more questions now.

Mr. Verleger: Yes, I want to ask a couple more.

Q. Where you place pipe in soil which is rated as either slightly corrosive or not corrosive at all, and you have these slight injuries, I take it ordinarily you do not have damage to the pipe from corrosion, is that correct?

(Testimony of Robert R. Ashline.)

A. That's right. The rate of corrosion would be slower, then.

Q. It takes the combination, putting the pipe in corrosive soil and some sort of nick or abrasion on the surface?

A. That's right, on sand cast pipe. [166]

Q. Yes, sand cast pipe.

A. On metal mold pipe today it doesn't matter whether you place it in a place where it is slight or severe, it will start right off.

Q. Likewise, I take it it is true that with the sand cast pipe, as well as with the metal mold, there is a considerable experience in damage to such pipe in corrosive soils, is there not?

A. That's right.

Q. And that occurs, I suppose, because such nicks and dents on the surface of the pipe are fairly common in the course of installation, transportation, and what-have-you, is that right?

A. They were at the time these pipes were laid, especially.

Q. So if you have a sand cast pipe laid in a corrosive soil, the probability of corrosion somewhere along the length of the pipe because of the presence of such a nick is pretty high, is that correct?

A. Yes, it is.

Mr. Verleger: I have finished.

The Court: May I ask this witness a question while you are looking up your notes?

Mr. Yoakum: Yes.

(Testimony of Robert R. Ashline.)

The Court: In this particular area, that is in the [167] Harbor area, how many miles of pipe do you now have similar to the pipe that we have been discussing here, if you know?

The Witness: Well, you can see the map there. It is all of the San Pedro and part of the Wilmington area. In fact, all of that is cast iron pipe. There is quite a few miles.

The Court: We are not talking about cast iron pipe. We are talking about pipe made 30 or 40 years ago.

The Witness: We have a line on Signal Street right in the area of the Harbor Department's break that was laid the same year, 1914.

The Court: How long is that?

The Witness: You mean that particular line?

The Court: Yes.

Mr. Yoakum: We have those figures here.

The Court: All right. Maybe I am anticipating.

Mr. Yoakum: I appreciate your Honor's questioning. We would like to put up this map, I for identification.

The Court: On the map, the way you have got it, the main channel is at the top. In the other map the main channel is at the bottom. It will be hard enough to keep this straight without having your map turned around.

Mr. Yoakum: That map doesn't have any direction signs on it and it is misleading. I will get oriented here in just a moment, I hope. Is the top of this map the north, [168] your Honor? The east

(Testimony of Robert R. Ashline.)

channel, strange as it may seem, is to the west. It is not to the east of Pier 1 area.

Cross-Examination

By Mr. Yoakum:

Q. Mr. Ashline, what is this map that we have put up here as Exhibit I for identification?

A. Those are our maps used to show the pipe lines, Los Angeles Water System pipe lines.

Q. That is in the area and out onto Pier 1 from 22nd Street on the north, out on the end of Signal Street?

A. Yes, sir.

Q. Can you step down here and indicate where your line is, and when I say "your line," I am talking about the Water Department's line.

A. (Witness leaving stand and going to map.)

The Court: May I inquire, does any other department maintain a water line there other than the Water Department?

Mr. Yoakum: The Harbor Department maintains the eight-inch fire line that has been identified. If it is not clear yet, it will be that that fire line is westerly of the ten-inch main that is maintained by the Water Department, but that the fire line, the eight-inch line, off of which this lateral came here, this is maintained by the Harbor Department exclusively. Does that answer your Honor's question? [169]

The Court: Do you actually maintain it or do they maintain it just on paper? Is there actual maintenance there?

(Testimony of Robert R. Ashline.)

Mr. Yoakum: They own it. It is under their jurisdiction.

The Court: Who installed it? Did they install it?

Mr. Yoakum: Yes, they installed the eight-inch line; the Water Department installed the ten-inch line that goes down the middle of the street, or approximately the middle.

The Court: Which line was installed first?

Mr. Yoakum: I can't tell you exactly. The lines were installed between 1914 and 1915. I would suppose that the Water Department line would have to be in before we could take any water into our line.

The Court: Do you mean to say one department of the City would go down there and establish a line, put in lines, and after they get through another department of the City would go down and put in a parallel line?

Mr. Yoakum: It parallels it, but it is not for the same function. The ten-inch line is a multi-purpose line.

The Court: Why wouldn't the two lines be put in at the same time by the same workmen?

The Witness: There is no connection between the Los Angeles Water Department and the Harbor System. [170]

Mr. Yoakum: They are just separate departments. I don't know why. They have their own autonomy, the Water Department. I am just assuming this is laying lines to establish connections to

(Testimony of Robert R. Ashline.)

possible consumers, but they are not concerned with what the consumer does within his own yard, as it were. In other words, to serve you, the water company runs a line down in front of your house, and a lateral into a meter, and they don't care how much pipe you lay inside there, so long as you don't abuse it. I don't know whether it was all laid at one time. The plans show that they were drawn in 1914.

The Court: I am interested, because I want to know whether or not there is any real distinction between these two bodies, whether we should keep them separate, or consider them all as part of the City of Los Angeles.

Mr. Yoakum: The matter is under consideration. It is developed in the briefs that have been filed. You will note that under the Charter the Harbor Department is vested with almost complete sovereignty with reference to harbor activities, and that no other department has anything to do with its activities, with the possible exception of the Fire Department. The Water Department doesn't have anything to do with it. It is none of their business if we put in a line or not, if it is on our property. They serve us.

The Court: Go ahead. Proceed. [171]

Q. (By Mr. Yoakum): I wish you would show on this map here by red crayon the Water Department's ten-inch line going down Signal Street. I think instead of trying to draw a line the entire length, let's draw an arrow line to it, draw a red

(Testimony of Robert R. Ashline.)

arrow line to the ten-inch line and then mark out here A-1.

A. (Witness complying.)

Q. Now, that is the Water Department's ten-inch main, right?

A. Right.

Q. Now, then, can you locate on here certain service connections which connect for fire water purposes to the eight-inch—is the eight-inch line of the Harbor Department shown on this map?

A. No, I don't believe it is.

Q. Don't you show the service connections to it?

A. Yes.

Q. You said you don't believe that the eight-inch line is shown. Do you want to correct that or does that testimony still stand?

A. It is not shown as far as I can see. These are railroad tracks in here, so it is rather confusing.

Q. Will you indicate by an arrow and the legend A-2 the place where the Water Department has a detector meter and a Hersey check valve coming off of the ten-inch main? [172]

A. (Witness complying.)

Q. If there is another one of similar character, indicate that and call it A-3.

A. (Witness complying.)

Q. Do you have another one?

A. A-4?

Q. A-4, yes.

A. (Witness complying.)

Q. Did I ask you, this is a Department of Water map of that area?

A. Yes.

Mr. Yoakum: We would like to offer that in evidence as Exhibit I.

The Court: It may be received.

(Testimony of Robert R. Ashline.)

The Clerk: I admitted in evidence.

(The exhibit heretofore marked Defendant's Exhibit I was received in evidence.)

Q. (By Mr. Yoakum): Now, a pipe going down Signal Street—I am talking about your ten-inch Water Department line, unless I otherwise indicate, was laid in what year? A. 1914.

Q. Was that cast iron pipe? A. Yes, sir.

Q. Do you know whether it was the same general type? [173] I have in mind it is larger than the pipe involved in this lawsuit. Do you know whether it was the same general type of cast iron pipe?

A. I believe it probably was the same type.

The Court: Do you know when the eight-inch line was laid?

The Witness: I believe it was laid in 1914.

The Court: Then the ten-inch and eight-inch lines were laid in the same year?

The Witness: I believe so.

Mr. Yoakum: The testimony by way of interrogatories that were read in is to the effect that the eight-inch line was laid in 1914.

The Witness: The exact month, I believe you have a record of the exact months that our pipe was laid, the L. A. Water System.

Mr. Yoakum: I have a record of those here, but I don't have it at the lectern. I will get it at our recess.

Q. Up to March 12, 1956, which was the date

(Testimony of Robert R. Ashline.)

that this pipe in question burst, had the Water Department had any breaks in the line extending south of 22nd Street and southerly out to the end of—

Mr. Verleger: That would be objected to on the ground no sufficient foundation has been laid as to whether [174] this particular witness would know of all breaks.

The Court: Overruled.

Q. (By Mr. Yoakum): Did you get the question? Do you understand the question?

A. Your question, yes.

Q. You may answer it.

A. Is it all right for me to answer?

The Court: Yes.

The Witness: We had one break that I found a record of. The exact year it occurred, I would have to look up that record again, but the location of the leak was near the end of the line which is near the bottom of the map.

Mr. Yoakum: Would you stipulate, Mr. Verleger, that if the witness looked at the answers you have already offered in evidence, his answers to your interrogatories, that the testimony would be that this one break was in 1949, and was about 2,400 feet south of 22nd Street?

Mr. Verleger: If that is what his answers say, I have no objection to so stipulating.

The Court: When you are talking about a break in the line, you are referring to the eight-inch line?

The Witness: No, it is our ten-inch water line.

(Testimony of Robert R. Ashline.)

The Court: The ten-inch water line?

The Witness: Yes, sir. [175]

Q. (By Mr. Yoakum): To clear this up, the Water Department pays no attention to the breaks in the fire line, the eight-inch line, does it?

A. No, sir. We have no jurisdiction over it.

Q. Can you tell us what this break was? 2,400 feet, that would be pretty far seaward, wouldn't it?

A. It is near the end, yes.

Q. What was that due to?

Mr. Verleger: I would object, no sufficient foundation laid, your Honor.

Mr. Yoakum: He has already read it in evidence.

The Court: Overruled.

The Witness: The leak report stated that there was a crack in the cast iron pipe.

Q. (By Mr. Yoakum): Has the Water Department at any time made any studies of pipe installed in the year 1914 or thereabouts by the Harbor Department? A. No, they have not.

Q. I am excluding anything you might have done with reference to this subject pipe after the break, but up to that time? A. Up to that time, no.

Q. Does the Water Department exercise any jurisdiction [176] over pipes installed by the Harbor Department? A. No, sir.

Q. Are you familiar with the practice generally prevailing in Southern California and elsewhere with reference to maintenance of water pipes?

A. Yes, I am.

Q. Is there any practice that you know of for

(Testimony of Robert R. Ashline.)

digging pipes up to inspect them to see if they should be replaced? A. No, sir.

Q. What is the reason, if you know, why that is not done?

A. Well, there are probably several reasons. The first reason is, especially with cast iron pipe, if we dug down to the pipe a normal hole that a man could get at, let's say 2x3 feet in area, he might examine the pipe and find it is in perfect condition. However, one foot away there is a possibility that pipe might be badly corroded.

Another reason is that the cost, I mean of digging the pipes up just to see whether they are corroded or not, would be prohibitive.

I don't believe the public would care too much about having the streets dug up, and how would we arrive at when and how often to dig down.

Q. There is then, I take it, no practice to dig down into the ground to look at buried pipes unless you suspect something wrong? [177]

A. That's right.

The Court: May I ask a question?

Mr. Yoakum: Yes, your Honor.

The Court: What do you do, put the pipe in the ground and leave it alone until it breaks?

The Witness: Generally, the only time that we ever replace a pipe is because of obsolescence. In other words, the pipe is too small, the fire department may want more water in the area, or if we have a section of line that has had recurring leaks and they are going to resurface the street, we will

(Testimony of Robert R. Ashline.)

go in ahead of the resurfacing and either abandon the line or replace it with a new one, or dig it up and replace it with a new one.

The Court: You don't have any system whereby you estimate the life of the pipe line and then change it or replace it at the end of that period?

The Witness: No. At the present time and for some years, I mean since about 1935, we take precautions to protect our pipe against corrosion now. We don't just put it in bare and forget about it. We believe we have well over a hundred year life now on our cast iron pipe that has been laid and is now being laid.

The Court: You put the pipe in the ground and leave it alone unless something happens to it?

The Witness: The City of Philadelphia has cast iron pipe [178] that has been in 150 years. They are not digging it up to replace it.

Q. (By Mr. Yoakum): At the time this pipe was installed around about 1914 or 1915, was this technique known of protection that you say now you use when you suspect highly corrosive soil?

A. As far as I can determine from the research back in old records, there was very little known about the corrosivity of soil in 1914.

Q. What are these techniques that you now use when you have a highly corrosive soil?

A. Well, generally now we in a severely corrosive soil where we formerly used cast iron, we use cement asbestos pipe, and if the pressures are

(Testimony of Robert R. Ashline.)

higher, we will go to cast iron pipe, and if it is in an area where there is sea water or tidal action on the pipe, we use a coal tar enamel over the outside of the pipe.

Q. Those techniques were not in use in 1914, were they? A. No, sir.

Q. Did you get a section of this burst pipe, specifically the bell section here known as G-1, this bell end piece? A. Yes.

Q. At the time you got it, was this little piece here, that [179] is G-2, a part of this bell section?

A. Yes, sir.

Q. And what did you do when you got G-2?

A. I had this section cut off to examine the effects of corrosion, and I etched the surface to brighten it, to show the lines of demarcation where the graphitic corrosion had progressed around the pipe, and to also show by observing this pipe from here——

Q. You mean from the exterior as distinguished from a cross-section?

A. Exterior, that it could retain its full wall thickness even though it is corroded almost halfway through, or over halfway through at this point. The pipe retains its shape even though it is losing strength.

Q. That piece of pipe, when a person dug the dirt up around that pipe, when it was in the ground, could he tell by looking at the exterior of that pipe that any graphitic corrosion was taking place?

A. Not by looking at it, no. I might add, too,

(Testimony of Robert R. Ashline.)

that it is characteristic of cast iron pipe that has been graphitized that when it is out of the ground and exposed to the air, that the corrosion products that are left here will fall off. That is why you observe that some of this is gone.

Q. The product that remains is carbon, is that correct? [180]

A. Carbon and other impurities.

Q. And the iron is taken out by this process?

A. Yes.

Q. When it is first exposed to air after having been buried a long time, this carbon is soft and you can dig into it with a knife or something?

A. Yes.

Q. But then it hardens?

A. Hardens on exposure to the air.

Q. In connection with the studies that you have made, have you ever reported any of these studies or findings to the Harbor Department?

A. No, sir, I never have.

Q. When you have leaks in your Water Department lines, do you report those to the Harbor Department? A. No, sir.

Q. Let me call your attention to Exhibit 28-A, which is this corrosivity map. Does that indicate that even where the land abuts the ocean there sometimes will not be severe corrosivity?

A. What is that?

Q. There are different colors which indicate the severity of the corrosivity, the red being severe, and the green being indicated as slight. My question is,

(Testimony of Robert R. Ashline.)

are there areas that are adjacent to the bay or the sea water where the [181] corrosivity is slight?

A. There are, yes, sir.

Q. To sum it up, there is no uniform pattern that develops, is there?

A. No, because the soils will vary in their classification depending on where they were hauled in from, or whether they were dredged out of the harbor. That is the reason for the lack of uniformity.

Q. Does the Water Department experience corrosivity, a high degree of corrosivity in areas that are inland considerably?

A. Yes. We have areas in the San Fernando Valley and in the central part of Los Angeles that are even more severe to cast iron than this section of Signal Street.

Q. Do you have any near the Wilshire area that you recall?

A. Yes, we have had some very sad experience with cast iron pipe at Wilshire and Curson where a metal mold cast iron pipe failed in less than five years.

Mr. Yoakum: I wonder if we could have this map marked?

The Court: While the clerk is marking that, we will take the morning recess. We will now recess until fifteen minutes after 11:00.

(A short recess.) [182]

The Court: You may proceed.

Q. (By Mr. Yoakum): Mr. Ashline, I show you

(Testimony of Robert R. Ashline.)

what has been marked here as Exhibit J for identification and ask you to tell the court what that represents.

Mr. Verleger: Your Honor, I am going to object on the ground this appears to be a map of the San Fernando Valley, at least counsel so advises me. I have no doubt that graphitic corrosion occurs elsewhere than on the sea shore. At one time we put in some interrogatories concerning corrosion all over the City, and counsel objected to that.

The Court: What is the purpose of this? What are you trying to establish?

Mr. Yoakum: The purpose is to show that this graphitic corrosion, or the area of high corrosive severity, there is nothing unique about that along the sea shore. It happens all over. Counsel apparently makes a point because it is corrosive at the sea shore, that is something that was significant.

The Court: Not necessarily. I said I suppose at the sea shore the more salt there was in the ground, the more corrosive the soil would be. But this witness tells me that is not so. I am going to sustain the objection because I am satisfied that there are other areas, not only along [183] the sea shore, but other areas where they have a high salt content in the soil and high corrosion. I am thinking about down around the Salton Sea. I don't know what happens down there. The ground down there has a lot of salt in it.

May I ask this witness a question?

Mr. Yoakum: Certainly, any time, your Honor.

(Testimony of Robert R. Ashline.)

The Court: When this pipe was installed, as far as you know, was it the best pipe obtainable? I mean by that the cast iron pipe, was it considered to be the best pipe available?

The Witness: I believe it was, sir, at that time. It is still considered—I mean cast iron pipe.

The Court: I am talking about this particular brand of cast iron pipe when it was installed in 1914, as far as you know, it was the best pipe available on the market?

The Witness: I believe so, sir.

The Court: For this sort of work.

The Witness: At that time no one knew much about corrosivity in 1914.

Q. (By Mr. Yoakum): I will show you a document here that has been marked K for identification, consisting of ten sheets, and ask you if those are photostats of records that are under the control of your department? [184]

Mr. Verleger: The witness has already testified that they were laid in 1914. Is this just cumulative?

Mr. Yoakum: No. The court asked how many feet had been laid and I told him I had some records.

Mr. Verleger: All right. That's okay.

Q. (By Mr. Yoakum): What are those?

A. These are commonly called pipe location reports that are filled out by the foreman that supervised the installation of this particular line.

Mr. Verleger: Your Honor, if counsel so stipulates, I am prepared to stipulate these are the

(Testimony of Robert R. Ashline.)

records of laying the original pipe, and we might save a little time that way, of the ten-inch main, if that is what they are.

Mr. Yoakum: That is the ten-inch main, yes, starting north of Signal Street and going out to the water.

We would offer those records as our Exhibit K.

The Court: It may be received.

The Clerk: K admitted in evidence.

(The exhibit heretofore marked Defendant's Exhibit K was received in evidence.)

Q. (By Mr. Yoakum): Now, Mr. Ashline, how many feet of ten-inch pipe are represented by those records there?

A. 5,244 feet of ten-inch cast iron pipe laid under the [185] one report number. The number of the report is 20395, consisting of one to ten sheets.

Q. Would you please step to the board here and show on Exhibit 28 the profile or the course of the pipe indicated on these sheets?

A. Starting on Signal Street at the very end.

Q. That would be at the end of Pier 1?

A. Pier 1, continuing up Signal Street, along Signal, turning on Signal here.

Q. You mean turning west on Signal?

A. Turning west. It turns one block north and then west to Pacific (indicating).

Q. Up to March 12, 1956, with the exception of that one rupture that you testified to occurring in

(Testimony of Robert R. Ashline.)

1949, have you had any trouble with any of this 5,000 feet of pipe?

Mr. Verleger: That is objected to on the ground no foundation is laid. If the question is, does the witness have any records of such trouble under his custody, I don't know.

The Court: Read the question.

(Question read.)

The Court: Do you mean have you personally, or are you talking about the City?

Mr. Yoakum: I mean the Department of Water & Power.

The Court: I will overrule the objection. You can answer [186] that "Yes" or "No."

The Witness: The answer is "No." I might add that we keep a record of every leak that occurs and we have records quite a few years back.

The Court: May I inquire, do the records show you have had no trouble except this one break?

The Witness: That is the way the records show.

Q. (By Mr. Yoakum): It is so indicated on this 28-A, isn't it, that there was no break except that one?

A. That's right, sir.

Q. I don't know whether it has been made clear or not. This 5,244 feet was laid when?

A. In 1914.

Q. Did you get some water samples from under Berth 59?

A. Yes, I did.

Q. That was rather recent, was it?

A. Yes, sir.

(Testimony of Robert R. Ashline.)

Q. When was it?

The Court: Counsel, just a minute. You say water samples under the Berth? You mean water from the bay or the harbor?

Mr. Yoakum: I will develop that.

Q. Do you know what was done to obtain the samples? [187]

A. As far as I know, the sample was taken——

Mr. Verleger: Objected to, your Honor, on the ground that no foundation has been laid as to whether the witness was there or somebody told him or what.

The Court: He is trying to lay a foundation. I want to know what you mean by water sample and what kind of sample did you take.

Mr. Verleger: Did the witness take it?

Mr. Yoakum: I was trying to lay it with this witness, but there is another witness we will have later that actually dug the hole.

The Court: Maybe you can tell us where the sample was taken from and when it was taken and by whom it was taken.

Mr. Yoakum: I can tell you from records in my possession, and we will tie this up with proof later on, that there was a vertical test hole dug a short distance west of the shed 59 in June of 1958, and they went down a depth of about 7½ feet under the floor of shed 59, and at that time they were below high tide line, the high tide being approximately 6 feet. Two samples were taken, one at 10:00 a.m.

(Testimony of Robert R. Ashline.)

and another at 7:00 p.m., 6/27/58, and the samples of this water were turned over to this witness.

The Court: This shed is built upon ground, upon earth. [188] It is probably a fill, but nevertheless it was earth. You get down and you take a water sample. Do you mean to say the earth was water loaded, or did they go clear down to a pool of water?

Mr. Yoakum: Of course, I wasn't there, but I will tell your Honor what we expect to show. We expect to show at the time they took this sample they did discover a little—I don't know whether you would call it a freshet or a very, very minor subterranean stream, and they took some of this water and analyzed it.

The Court: What difference does it make?

Mr. Yoakum: There has been a suggestion that there was salt water intrusion in here. The shed was 100 feet, this place where the break occurred, it covered part of the shed, there was a large dock on the seaward side, and then there was this ten-foot wide dock on the landward side under which this pipe burst, so we were at least 150 feet in from the sea there, and we didn't have salt water intrusion. We found water, but we didn't find any salt water.

The Court: Counsel, if I understand the plaintiff's case, and maybe I don't understand it, but if I understand the plaintiff's case, the plaintiff is claiming negligence. First, there might be negligence of installation. We have had no evidence so far

(Testimony of Robert R. Ashline.)

about any negligence of installation. [189] So far as we know, the pipe was installed correctly.

There might be negligence of manufacture. They might have used a second grade pipe, or they might have used defective pipe. There is no evidence to show that. In fact, this witness testified a moment ago as far as he knew this was the best available type of pipe on the market.

The only negligence I think that the plaintiff has established at all is the fact that the pipe was installed in 1914 and then allowed to sit there until it burst. The burst was caused from corrosion. I don't know what the City could have done about the condition of the soil at that particular time.

The only argument that the plaintiff is going to be able to make is that the City knew that this was in highly corrosive soil and they were negligent in allowing the pipe to remain in the soil that long a period without either digging it up and replacing it, or digging it up and looking at it. That is the case, as far as I know.

Whether or not there was water in the soil or whether or not the water was fresh water or salt water, I don't know, and don't particularly care.

The soil was corrosive and it may very well be that the court could decide that the City or the Harbor Department, or whoever was responsible, was negligent because they let the pipe sit there for such a long period of time, [190] for 40 years. But, however, we have got testimony of this witness in the record that in Philadelphia similar pipe

(Testimony of Robert R. Ashline.)

stayed in the ground and was usable for 100 years.

Mr. Yoakum: I think the matter is really rather a side issue and I wouldn't attempt to develop it except for a couple of questions that the court asked about salt water intrusion, and I think your remarks have cleared up my problem.

The Court: I made that remark because I had the wrong impression. This witness is an expert. He told me I was wrong. I am willing to take his word for it. You don't have to convince me any more that I was wrong.

Mr. Yoakum: All right, your Honor. I will pass by that subject then.

Q. Has the Water Department ever had any practice of digging up cast iron pipe, old cast iron pipe that has not given you any trouble, merely because you knew it was in a highly corrosive area?

A. No, we have not.

Q. What is the usual pressure maintained on your ten-inch line down in Signal Street? I am, of course, referring to the year 1956.

A. I believe around 60 pounds per square inch.

Q. Do you know where the City gets this water that is run into this ten-inch main? [191]

The Court: Well, now, again, counsel, I think we are going outside the issue, because if there is any corrosion here, the corrosion came from the outside, and there is no claim, as far as I know, that the corrosion came from the inside.

Mr. Yoakum: That is correct, your Honor. The witness, I think Mr. Drake was his name, a chemist,

(Testimony of Robert R. Ashline.)

testified that he found in a gram of earth chlorides.

The Court: That's right. This may be important to show that some salt could have come into the earth from the water.

Mr. Verleger: Your Honor, I have to object, nevertheless, to introduction of evidence about this sample if that is what is being done, because my understanding on counsel's representation is that they went down $7\frac{1}{2}$ feet. My understanding is the pipe is laid 8 to 9, according to the answers.

Mr. Yoakum: I am past that.

The Court: You better catch up. You are way behind.

Mr. Verleger: I am sorry.

Mr. Yoakum: I have passed that subject, Mr. Verleger.

The Court: Objection overruled. Read the question.

(Question read.) [192]

The Witness: Yes, I do.

Q. (By Mr. Yoakum): Where does it come from?

A. At certain times of the year the water comes from our reservoir that is filled from the Metropolitan Water District line, and that water in turn comes from the Colorado River.

Q. You said certain times of the year. Being specific, would you know as to the month of March, 1956?

A. I would have to check our records at that time.

(Testimony of Robert R. Ashline.)

Q. Would you be able to do that during the noon recess? A. I would.

Q. Would you please do that? You examined this Exhibit G here just before your deposition was taken some eight or nine months ago, did you not?

A. Yes, I did.

Q. At that time was it in one piece or in two pieces?

A. As I recall, it was in two pieces.

Q. From your observation of the break, you concluded that a certain process of deterioration had taken place, is that right? A. I did.

Q. That is what you call graphitic corrosion?

A. Graphitic.

Q. In other words, through some chemical process that [193] I don't understand the iron is all removed from the pipe. When you look at the piece of pipe from the outside, you cannot tell, can you, whether it has been subjected to graphitic corrosion? A. Not from visual observation.

Q. With reference to the soil tests that you saw on 28-A, do you have any knowledge of when the tests were taken in the area of Pier 1?

A. I believe that I would have to check my records for the exact date of the test in that area.

The Court: There is no dispute, is there, that this pipe was installed in highly corrosive soil? There is no dispute on that. Regardless of when the map was made, whether it was made last year or ten years ago or thirty years ago, the fact still remains that the soil was highly corrosive.

(Testimony of Robert R. Ashline.)

Mr. Yoakum: I don't know. I can't answer that, because I don't know enough about the technicalities of it. I take it at the time the tests were made the soil was highly corrosive. Whether it was highly corrosive five centuries ago or 50 years ago or 40 years ago, I don't know anything about such a subject, so I couldn't stipulate. Maybe soils change in their character due to some chemical organization of the earth. I wouldn't be able to stipulate.

The Court: I thought that maybe this was a fill, that [194] you brought soil in from outside, from a non-corrosive area, but evidently you haven't got any evidence along that line.

Mr. Yoakum: I think our interrogatory answers said we do not have records of where that soil came from.

The Court: I think I am going to find that the soil was corrosive at the time this map was made. We have no evidence that it was corrosive at the time the pipe was installed. I don't think there is going to be any dispute unless you have got some evidence that the pipe was installed in non-corrosive soil and it became corrosive after it was installed and the defendant didn't know about it until they made these tests.

Mr. Yoakum: There is no evidence that the Harbor Department ever knew about it being corrosive until after this break occurred. The Harbor Department had never heretofore had any corrosion breaks, and the record is clear, I think, that the

(Testimony of Robert R. Ashline.)

Harbor Department was not informed of the studies made by the Department of Water & Power on its pipes. So if your Honor makes a finding, although I think that it may involve an assumption, that the soil was corrosive when the pipe was installed, I can't argue with you on it, because I don't know about the chemistry of such things, but I can repeat and respectfully urge you that there is no evidence thus far, and it is all to the contrary, that the [195] Harbor Department had no knowledge of the soil's corrosivity.

Just let me check my notes a moment, please.

The Court: I think the evidence would also sustain a finding, at least at this time, when the pipe was installed, although the soil was highly corrosive, the installers, the City or the Harbor Department didn't know it, because the witness has testified at the time in 1914 they did not know anything about this question of corrosion.

Mr. Yoakum: We have nothing further except that one matter concerning which I was going to check at noon time, your Honor. Thank you.

The Court: He can come back after lunch.

Mr. Yoakum: Thank you for letting me examine him out of order.

Mr. Verleger: You are welcome, counsel. I just have a couple of questions.

The Court: Go ahead.

(Testimony of Robert R. Ashline.)

Redirect Examination

By Mr. Verleger:

Q. You testified, Mr. Ashline, you can't tell whether pipe has graphitic corrosion simply by looking at it. I take it if you open it up for inspection and scratch away and find the pipe is actually soft, you will ascertain the softness, will you not? [196] A. Yes.

Q. And by the same token, by hammering on it it is possible sometimes to tell, as I think Mr. Brashier testified earlier, whether the pipe is soft or not? A. That's right.

Q. So if you do open the pipe up and move it, there are ways of finding out?

A. Ways of finding out, yes.

The Court: May I ask this witness a question?

Mr. Verleger: Yes.

The Court: Assume we have a pipe line that is 5,000 feet in length. Some question has arisen as to whether or not there is corrosion. You decide to make an investigation to see whether there is corrosion. You have to open the entire line, do you not?

The Witness: Yes.

The Court: You would have to look at every inch of that pipe line?

The Witness: That's right.

The Court: Because there could be corrosion in one spot and ten inches away there would be no corrosion?

(Testimony of Robert R. Ashline.)

The Witness: That is correct.

The Court: In order to make an inspection, actual inspection, you would have to open the pipe line and you would have to examine it carefully, top, bottom, and on the sides? [197]

The Witness: Yes.

The Court: Every inch of it?

The Witness: That's right.

Q. (By Mr. Verleger): Further, Mr. Ashline, you said earlier in Philadelphia they had 150 years experience of life with pipe. Where you have pipe in highly corrosive soil, you do not expect any such life for the pipe, do you?

A. Well, generally not, but there are exceptions.

Q. There are exceptions, but generally you don't. Mr. Ashline, back in May, 1938, you prepared an article in the American Water, Journal of the American Water Works Association, on testing of soils prior to installation of metal pipes, and you prepared some charts on the life of pipe in years in corrosive soils where it is poorly protected, isn't that right? A. That is poorly protected pipe?

Q. Yes, poorly protected or unprotected pipe in corrosive soils. A. Yes.

Q. The charts you prepared indicated a life of ten to perhaps twenty years for pipe in such soil?

A. That's right.

Q. Is that correct?

A. Sometimes even less. [198]

The Court: This pipe, would you call the pipe installed here protected or nonprotected?

(Testimony of Robert R. Ashline.)

The Witness: It was unprotected pipe as far as present day practices are concerned.

Q. (By Mr. Verleger): One other factor. The information that the Water Department has collected with respect to corrosive areas is generally available to those who have need for it, is it not?

Mr. Yoakum: First, I will object on the ground it is immaterial as far as the Harbor Department is concerned.

The Court: Overruled.

Q. (By Mr. Verleger): Will you answer the question? A. May I have the question again?

(Question read.)

A. That is true. We furnish all of our consumers on an annual basis with any soil information to help mitigate any corrosion problem they might have. That is usually on request.

Q. But the information is freely available?

A. Yes.

Q. One further question. The testimony was that the Water Department has meters and a check valve in Signal Street there. Those meters are equally available for the examination of your customers and your own people, are they not? [199]

A. I believe they are.

Q. There was some discussion concerning your experience with respect to corrosion along Signal Street in this pipe line here. You have had a number of breaks due to corrosion just around the corner on 22nd Street here, have you not?

(Testimony of Robert R. Ashline.)

A. Yes, we did.

The Court: How many breaks due to corrosion?

The Witness: I believe they are marked there, your Honor.

Mr. Verleger: Approximately six are indicated, your Honor.

The Witness: About six breaks, and that section of line was replaced.

The Court: When was that section of line installed, if you know?

The Witness: I would have to check our records for that. I can get that.

The Court: Was it the same kind of pipe as this ten-inch pipe we have been talking about?

The Witness: I would have to check the pipe laying records to find out. I don't even know right now whether it was cast iron pipe or not. I will have to check the records. I think it is cast iron.

The Court: I wish you would check and find out what kind of pipe and when it was installed. [200]

The Witness: I will.

Mr. Verleger: It might help if you check the testimony on the deposition.

The Witness: That's right. It was all cast iron pipe.

Mr. Yoakum: The court, as I understand it, asked you to check the pipe laying records.

The Witness: That is on 22nd Street?

Mr. Verleger: That's right.

Mr. Yoakum: That is west of Signal Street here, I believe.

(Testimony of Robert R. Ashline.)

The Witness: I will check that. Do you have the date of the leaks?

Mr. Verleger: The date of installation and the date of the leaks are covered in the interrogatories, and it is indicated they are cast iron pipe.

The Witness: If you have the date of the leaks, there is no need for me to look it up.

The Court: I would like to know when the pipe was installed.

The Witness: He has it.

The Court: He has it?

The Witness: He has the date it was installed, I believe.

The Court: Can you tell us when it was installed? [201] Is it in the interrogatories?

Mr. Verleger: There are leaks shown, your Honor, in a pipe installed in 1934 on 22nd Street; failure in 1940, again on pipe installed in 1934; failure in 1941——

Mr. Yoakum: Where are you reading from?

Mr. Verleger: I am reading from page 4 of the additional answers to interrogatories with various numbers received by us July 17, 1957.

Mr. Yoakum: You say you are reading from page 4?

Mr. Verleger: Page 4. 22nd Street, installed 1934, failed 1941.

There is another, 22nd Street again, installed 1934, failure 1941. 22nd Street, installed 1934, failure '41. Another on 22nd Street, installed 1934, failure 1942.

(Testimony of Robert R. Ashline.)

The Court: And there was a failure in 1940, three in 1941 and one in 1942.

The Witness: Failure by corrosion.

The Court: Failure by corrosion.

The Witness: That was before we had protection of cast iron pipe.

The Court: The pipe installed on 22nd Street was the same kind of pipe, cast iron pipe was installed such as this ten-inch pipe or eight-inch pipe?

The Witness: It is not necessarily the same type of cast iron pipe. [202]

The Court: I wish you would look up and find out what kind of pipe it was. It may be it was a different type of pipe.

The Witness: There was metal mold cast iron pipe at that time, which is more readily attacked.

The Court: You look it up and find out what the records show as to what kind of pipe it was.

Mr. Yoakum: Will you make a note of that so you will be sure to do it?

The Witness: I will.

Q. (By Mr. Verleger): In addition, there appear to be just sort of across the way here on Beacon Street, there appear to be something in the order of nine breaks in cast iron pipe indicated, and those also—as I understand it, this map covers only corrosion failures, so those also would be corrosion breaks in cast iron pipe? A. Yes.

The Court: Will you look up that and see when that was installed?

(Testimony of Robert R. Ashline.)

The Witness: They have the record when it was installed.

The Court: And what kind of pipe was it? It may be possible you are using a different kind of pipe.

The Witness: What is the name of the [203] street?

Mr. Verleger: Beacon Street.

Mr. Yoakum: Do you wish him to check on Beacon Street, as well as 22nd?

The Court: Yes.

Mr. Verleger: No further questions.

The Court: There is something else I would like to have established. I don't have this established in my mind yet. Assuming when this ten-inch or eight-inch pipe in 1914 was installed that neither the City nor the Fire Department knew that the soil was corrosive, I would like to know when the City first found out that the soil was corrosive and when the Fire Department first found it out.

Mr. Verleger: The Harbor Department, you mean?

The Court: I mean the Harbor Department. Evidently, from counsel here, the Harbor Department doesn't know it to this day.

Mr. Yoakum: From these studies that have been made, I think the witness has testified that they were not cognizant of corrosion problems until he started his studies about 1934. Maybe I am saying something he didn't testify to, but that is my recollection. Maybe that answers your question.

(Testimony of Robert R. Ashline.)

The Witness: I can get the date we made tests in that area for you at the same time I am getting this other data. I might add that since 1935 we make soil corrosivity [204] surveys prior to the installation of pipe lines. We don't make the test after they are installed. We determine the corrosivity of the soil along the route the pipe will be laid and protect our pipe accordingly. The tests that were made out in that area and practically all of the San Pedro area, were made prior to installations or when a failure occurred. In other words, if we replace a fire hydrant anywhere in the San Pedro, or anywhere in the City of Los Angeles, we make a soil test. I mean that is just a small section of pipe that is being put in, but if we replace any pipe, we make quite a few tests along the line.

The Court: May I ask a question about your job? You are an engineer?

The Witness: Yes.

The Court: You work for the City of Los Angeles?

The Witness: I work for the Los Angeles Water System.

The Court: I am trying to find out, do you work for the City of Los Angeles, assigned to the Water System, or do you work directly for the Water System? Are you paid by the City of Los Angeles?

The Witness: I believe so.

The Court: What does your check say? That is a pretty good indication of who employs you.

The Witness: I have cashed my check this

(Testimony of Robert R. Ashline.)

morning [205] already. It doesn't say on this stub. It comes out of the Treasury of the City Hall, I do know that. It is through our revenue water fund.

The Court: Don't you engineers that work for the City and all of its branches have some sort of an organization? Do you ever get together and talk over mutual problems?

The Witness: We have several engineering organizations that would take in some of the City engineers, but we are not generally classed as City employees in a sense.

The Court: I am trying to find out about this. You found out that this soil down here was corrosive. Didn't you ever tell any of the other engineers of the City, "You have got a corrosive condition down there?"

The Witness: Only within my own organization.

The Court: You never discussed this with engineers for the Harbor Department?

The Witness: Never have. I didn't even know that they owned that line until this came up. We have similar installations with the studios, of fire meters and fire services, the same as this.

The Court: When you found out for the Water Department that you had a corrosive condition down there at the Harbor, you never went to your brother engineers who had similar problems and said, "Here, there is a corrosive condition down there. You better check into it and see what [206] effect it is going to have on you?" You never did that?

The Witness: I never have.

(Testimony of Robert R. Ashline.)

The Court: You just kept it to yourself?

The Witness: I have published quite a few articles. Maybe they have read some of them. I don't know. I have given quite a few talks to the Western Plumbing Society and American Water Works Association.

The Court: May I inquire, how many miles of water line does the Harbor Department maintain down there?

Mr. Yoakum: We will offer in evidence——

The Court: Just tell me.

Mr. Yoakum: On six, eight and ten-inch is all I have got the figures on, and it is over ten miles.

The Court: The Harbor Department?

Mr. Yoakum: Yes, about 55,000 feet. We will offer the evidence.

The Court: The Harbor Department never told anybody the soil was corrosive down there?

Mr. Yoakum: The Harbor Department didn't know it. The Water Department never told the Harbor Department.

The Court: Did the Harbor Department know it was corrosive?

Mr. Yoakum: No. There will be no evidence that I know of that they did know it. Our evidence will be that they know it now. [207]

Mr. Verleger: Mr. Wakeman did testify he knew about graphitic corrosion, he knew it was prevalent in areas of this sort. That would seem to be enough to put a competent engineer on inquiry, at least.

The Court: I don't know.

Mr. Yoakum: He wasn't even working there when the pipe was installed.

The Court: We have got here two legal entities and it is just possible knowledge of the Water Department wasn't knowledge of the Harbor Department.

Mr. Verleger: Your Honor, I don't think they are legal entities in that sense. They are divisions.

The Court: All right, divisions.

Mr. Yoakum: You read the Charter and you will see the autonomy. I think the Charter will answer the question about where he gets his pay, too. He gets it from the Water Department. They have their own budget.

Mr. Verleger: Your Honor, when we want to sue somebody, we have to sue the City of Los Angeles. We can't sue the Harbor Department.

The Court: That's right, but they say, "We didn't know." This is a technicality. It is 12:00 o'clock. We will take the noon recess. We will recess until 2:00 o'clock.

(Whereupon at 12:00 o'clock noon, an adjournment was taken until 2:00 o'clock p.m. of the same date.) [208]

Wednesday, October 8, 1958, 2:00 P.M.

The Court: You may proceed.

Mr. Yoakum: May it please the court, just at the noon recess we were more or less having a little colloquy about the charter provisions and powers of different departments. During the recess I made a

note of some of them and I can give them to you now, if you would be interested in having them.

The Court: All right.

Mr. Yoakum: For example, in Section 139 the powers of the Board of Harbor Commissioners are defined.

In Section 220 the powers of the Commissioners of the Department of Water and Power are defined.

In Subsection 5 of Section 220 it is provided that the Department of Water and Power may be sued or sue. There are numerous cases where the Department of Water and Power is a litigant without the City being involved in the case. There are two of them that we jotted down during recess. One was in the Ninth Circuit, Department of Water and Power against Anderson, 95 Federal (2d) 577, and a California case, Department of Water and Power against Vroman, 218 Cal. 206. At 216 of that opinion the court discusses the broad, wide, extensive powers this Department of Water and Power possesses.

Section 221 of the charter provides that none of the [209] money in the water revenue fund shall be used for any purposes except as herein stated. The first purpose that they enumerate is that they shall pay out for their necessary expenses of running and maintaining their works.

In Section 220.1 they are given the power to establish their own retirement, disability and death benefits.

In 229, Subsection 2a, they are given the power to borrow money and issue revenue bonds and other bonds. Certain of the bonds they can do without any permission of the city fathers.

In Section 222 they are permitted to adopt a special budget.

In Section 345, it is provided that both the Harbor Department and the Department of Water and Power, neither of them are subject to the general city budget.

I give that brief reference to the charter provisions to show the broad autonomous powers these departments have, and particularly the Department of Water and Power, which has even broader powers than the Harbor Department.

The Court: All right. Call your witness. [210]

ROBERT R. ASHLINE

the witness on the stand at the time of recess, being heretofore duly sworn, was examined and testified further as follows:

Recross-Examination

By Mr. Yoakum:

Q. Now, Mr. Ashline, I think the court asked you to determine when you first made soil tests on Signal Street, the Water Department.

A. The first soil tests on Signal Street were made in 1946, and later more in 1949, and some in 1952.

Q. Were you able to ascertain the type of cast iron pipe that was used on 22nd Street just a short distance west of Signal Street where you had a series of five or six breaks all at one time?

A. Yes, I was. Our reports show that the pipe was laid in 1934 and was Delahant cast iron pipe.

(Testimony of Robert R. Ashline.)

Q. Was it sand molded?

A. That is a metal molded pipe.

Q. Metal molded pipe? A. Yes, sir.

Q. The pipe that went down Signal Street, that 10-inch pipe that you identified this morning as having been made in 1914, in excess of 5,000 feet, that was what kind of pipe?

A. That was sand cast pipe. [211]

Q. Does sand cast pipe hold up better than this metal mold? A. Much better.

Q. Now, then, you were also asked to try to find out the type of pipe on Beacon Street. What did you find out in that respect?

A. I found that our pipe reports show it was laid in 1924 and there was no marking on the report other than it was cast iron pipe, so I could not be sure what type it was.

Mr. Yoakum: According to my notes, that answers the questions propounded by the court. I have nothing further of this witness.

Mr. Verleger: I have just a couple.

Redirect Examination

By Mr. Verleger:

Q. Your testimony was your first tests in Signal Street, Mr. Ashline, were in 1946, and the second in 1949? A. Yes, and 1952.

Q. I have here a document entitled "Progress Report of Studies of Graphitic Corrosion of Cast Iron," by Robert E. Ashline and William E. Karl, March, 1941. Do you recognize that report?

(Testimony of Robert R. Ashline.)

A. Yes, sir.

Q. That is a report you prepared? [212]

A. It is.

Q. I want to call your attention to this. There is a table, Table 1-A in this report, which gives field locations of soil samples listed in Table 1. Down there there is a sample 38-H-192, Signal Street, 49 feet north of warehouse, San Pedro. That would have been a test on Signal Street, would it not?

A. Yes, sir.

Q. And north of warehouse would be one of these warehouses over on the sketch, I assume, wouldn't it? A. I believe it would.

Q. Then there is a second one indicated here, 30-H-100, Signal Street, 29 feet north of warehouse, San Pedro. That again would have been one taken prior to 1941 on Signal Street in that vicinity, is that correct?

A. These were soil samples that were tested, not tests made there.

The Court: They were what?

The Witness: These were soil samples that were tested. These were tests we made on the spot.

Q. (By Mr. Verleger): But previous to the tests you made on the spot, back before 1941 you ran soil tests on that area? A. Yes.

Q. I notice that this is described as field locations of soil samples listed in Table 1. Table 1 is captioned [213] "Quantitative Analysis of Typical Soils in Los Angeles That Cause Graphitic Corrosion of Cast Iron." 38-H-192 appears there. I take

(Testimony of Robert R. Ashline.)

it then you had experience with the graphitic corrosion of cast iron on Signal Street before 1941.

A. I don't know whether we had a failure before that time.

Q. But the table would indicate that this is a soil which caused graphitic corrosion of cast iron prior to 1941 in Signal Street?

A. We sampled typical soils all over Los Angeles.

The Court: Just a minute.

Mr. Yoakum: I object to that. Counsel is testifying that this table indicates that. It may and it may not. I can't interpret it as to whether it indicates that.

Mr. Verleger: Suppose we ask the witness again.

Q. Again you state here Quantitative Analysis of Nine Typical Soils in Los Angeles That Caused Graphitic Corrosion of Cast Iron. What did you mean by soils that caused graphitic corrosion in cast iron?

A. Well, we probably had experience in that type soil.

Q. So that the sample 30-H-192 from Signal Street was a sample of soil of a type, at least, which had been known to cause graphitic corrosion of cast iron prior to that time, is that right?

A. That's right. [214]

Q. And it may have been a sample of soil taken from the immediate vicinity of such corrosion, is that right?

A. That's right.

Q. Similarly, 30-H-193, Signal Street, 29 feet north of warehouse, San Pedro, which again refers

(Testimony of Robert R. Ashline.)

to a sample on this table 1, is a sample of soil which was either of the type which caused graphitic corrosion of cast iron pipe or had actually caused such corrosion, is that right?

A. I don't know whether it actually had yet or not, whether we observed it, but in this particular group of soils, we knew they had had graphitic corrosion in San Pedro long before this date even.

Q. It is true, is it not, long before 1941, actually graphitic corrosion had been particularly troublesome in the harbor area, isn't that true?

A. It had been troublesome all over the area of Los Angeles.

Q. My question is, wasn't it particularly troublesome in the harbor area? A. It was, yes.

Q. I think you testified that this pipe up here on 22nd Street that failed was not of the sand mold, but was a different type?

A. That's right.

Q. Again, I would like to show you your testimony when [215] your deposition was taken, and call your attention to the testimony you gave at that time explaining the breaks in the pipe at that time.

Mr. Yoakum: What is the page number?

Mr. Verleger: Page 49, Mr. Yoakum. It starts down here, if you want to read through it before I ask the question.

Q. Isn't it a fact that you testified as follows: The question was:

“With respect to the particular indications of a

(Testimony of Robert R. Ashline.)

series of corrosion breaks which Mr. Verleger interrogated you on, on 22nd Street showing six dots along in a row, can you tell us or give us an explanation of the close proximity of such breaks along in a row there; what would be your view of the cause of those breaks close together?

“A. The close proximity of these leaks, we believe, is caused from a higher concentration of salts perhaps in the soil and the damaging of the skin of the pipe at some time or another in transit or by workmen at the time that they laid the pipe, breaking the natural protective skin of the pipe and allowing corrosion to progress at the point of abrasion. The early manufactured cast iron pipe was made in a sand mold which provided a high glass-like finish, you might say, skin, on the pipe, which afforded very good protection, and if that skin is broken, we have found instances where [216] the chain marks—I mean we have found instances where the chain marks were outlined on maybe a third of the outside diameter of the pipe as a result of being tightened down on the pipe and then placed in a severely corrosive soil, and you have eventual failure.”

That was your testimony at that time, was it not?

A. Yes, sir.

Q. Then to revert back to the question I asked you previously, there is no doubt, I take it, that your department at least had knowledge that the soil in Signal Street was highly corrosive going back as far as 1941?

A. Yes, we knew it then.

Mr. Verleger: Nothing further, your Honor.

(Testimony of Robert R. Ashline.)

Recross-Examination

By Mr. Yoakum:

Q. Calling your attention to your deposition, the assertion that was just read from it, were you trying to tell the counsel at that time the date that the pipe had been made, the type of pipe it was?

Mr. Verleger: That is objected to as calling for a conclusion of the witness. The witness' testimony speaks for itself.

The Court: Sustained.

Q. (By Mr. Yoakum): Do you have written records showing [217] the kind of pipe that was installed on 22nd Street, which you told us a few minutes ago was metal molded? A. I do.

Q. You don't have them with you?

A. I looked that up this noon.

Q. I am going to ask you then if you are excused if you will go down there and just——

A. I have it here.

Q. You just have a pencil note.

A. You want the actual record?

Q. Your testimony is being challenged, you see, by Mr. Verleger, so I want you to bring up the original records showing the kind of pipe that was laid along 22nd Street there at the place where these little breaks occurred. A. All right.

Mr. Yoakum: That's all I have. Any further questions?

Mr. Verleger: Nothing further.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Verleger: Mr. Berry, will you take the witness stand, please? [218]

JACK BERRY

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, sir.

The Witness: Jack Berry.

The Clerk: How do you spell your last name?

The Witness: B-e-r-r-y.

Direct Examination

By Mr. Verleger:

Q. Mr. Berry, by whom are you employed?

A. Outer Harbor Dock and Wharf Corporation.

Q. What is your job with them?

A. Vice president.

Mr. Yoakum: I didn't hear, sir.

The Witness: Vice president.

Q. (By Mr. Verleger): Where do you work normally?

A. At Berth 57 and 53. 57 at present.

Q. Do you also spend a great deal of time in the area under discussion here, Berth 59?

A. Almost every day.

Q. You are present in that area almost every day

(Testimony of Jack Berry.)

for a portion of the time, is that correct? [219]

A. Correct.

Q. Was that true back in March, 1956, and previously? A. Yes, sir.

Q. For how many years before March, 1956, had that been true? A. Since 1932.

Q. Can you tell us very briefly what the space at Berth 59 is used for?

A. By our company? It is used to receive cargo from trucks and rail cars to haul into the warehouse. I am speaking now of cargo going out on ships, to be held until the ship arrives, at which time they are placed on vessels. Also in reverse, cargo being discharged from a vessel are held on Berth 59 until the consignee picks them up.

Q. With respect to the goods that were involved in this particular wetting episode, that is, particularly the goods of the plaintiff, that is Grace & Co. (Pacific Coast), were they in the category of goods that had been discharged from a ship and were waiting to be picked up? A. They were.

Q. Is Outer Harbor Dock & Wharf Company the only company that is ever allowed to use this space? A. No, sir.

Q. Does the City sometimes place the goods of other individuals in the space? [220]

A. Yes, sir.

Q. In addition to that—well, who maintains the facilities there?

A. Los Angeles Harbor Department.

Q. That is the City does all the maintenance,

(Testimony of Jack Berry.)

is that right? A. Yes, sir.

Q. Just one further question. You are generally aware, I take it, of the fact that there is a sprinkler system in that building, are you? A. Yes, sir.

Q. Just as a matter of description, what is the outer wall of this building made of?

A. Poured concrete or steel, I don't know which. It is a combination of both.

Q. Is the piping that goes up to the sprinkler system, and also goes to the fire hoses, along the side within view? A. Yes, sir.

Q. It is not hidden away within any walls or anything of that sort?

A. No. It is on the walls.

Q. In the three months prior to the March 12th episode, had you observed any leakage coming out of any of the various facilities of that system above ground? A. No, sir. [221]

Q. Had you ever observed any evidence that longshoremen had sprayed water from this system around about the premises anywhere?

A. No, sir.

Q. In the entire time that you have been there, have you ever known them to do that?

A. No, I have not.

Q. Would it have been possible to do this within Berth 59 without actually getting cargo wet?

A. For the longshoremen to do this?

Q. Yes.

A. If the warehouse were halfway empty and

(Testimony of Jack Berry.)

they were working within that area, it would be possible.

Q. It could be done?

A. It could be done, yes.

Q. But so far as you can recall, it was not, is that right?

A. No, indeed.

Mr. Verleger: Nothing further.

Cross-Examination

By Mr. Yoakum:

Q. Did you say, Mr. Berry, that the City stored goods in the transit shed?

A. No, sir. [222]

Q. I understand you are the vice president of Outer Harbor. Just what are your specific duties, or what were they in the years 1955 and the early part of 1956?

A. I was directly under the operating manager.

Q. What did you do in that connection?

A. I was in complete charge of all the outside operation relative to stevedoring and terminal work within the area.

Q. How many berths did your company service, if that is a correct term, over which you personally had charge?

A. At that time?

Q. Yes, in 1955 and early 1956.

A. Five berths in the San Pedro area and one in Long Beach.

Q. What were they?

A. Berths 51, 52 and 53, Berths 58 and 59, or 59 and 60, I don't recall. There was a period that

(Testimony of Jack Berry.)

we did not have 58, at which time we were operating Berth 60.

Q. 58 and 60, when the fire walls are closed, is one long shed, isn't it, 1,800 feet?

A. 58 and 60?

Q. 58 through 60. A. That is correct.

Mr. Verleger: By that you mean 58, 59 and 60?

The Witness: 58, 59 and 60. [223]

Mr. Yoakum: Yes, 58 through 60.

The Witness: One complete berth with two fire walls.

Q. (By Mr. Yoakum): You wouldn't have cargo in there in all of those sheds at the same time, would you?

A. At times we had, yes, many times.

Q. But other times you would have cargo in one of the sheds and not in another?

A. That is correct.

Q. Would the fire walls be closed at times?

A. You mean the fire doors?

Q. Yes.

A. The fire doors are closed when we are not working cargo—if we are working in 58, we close the fire doors to the other two sheds.

Q. How much time would you say you spent in 58, 59, and 60 per day in the year 1955 and the first three months of 1956?

A. It is rather difficult to answer. It would all depend on how busy we were in that area where we are working. If we had ships there, I would probably spend as much as two or three

(Testimony of Jack Berry.)

hours a day. If there were no vessels there, I would spend no time there to speak of.

Q. Were your crews working at times when you personally were not there? [224]

A. Yes, sir.

Q. Can you give an estimate of how much time a crew would be working in a day compared to the time you would be there? You say you were there perhaps two or three hours at a time. Would a crew be perhaps working an eight-hour shift?

A. They were working a nine-hour shift at that time. I would say approximately a quarter of the time.

Q. Did you ever see any of the fire hoses down on the floor?

A. I have seen them on the floor, yes.

Q. Did you ever ask anybody why they were down there?

A. Yes, indeed.

Q. Do you know Mr. Brashier?

A. Yes, sir.

Q. Did you ever ask him?

A. No, because it was never his duty to put them back. It was our responsibility to put them back.

Mr. Yoakum: That's all.

The Court: Any other questions?

Mr. Verleger: Nothing further.

The Court: You may step down.

Mr. Verleger: May this witness be excused?

The Court: May he be excused?

Mr. Yoakum: Yes, your Honor. [225]

The Court: You may be excused.

The Witness: Thank you.

(Witness excused.)

Mr. Verleger: Will Mr. Montgomery please take the stand.

JAMES M. MONTGOMERY

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated and state your name, please.

The Witness: James M. Montgomery.

Direct Examination

By Mr. Verleger:

Q. Mr. Montgomery, will you try to use the microphone and keep your voice up fairly well?
Mr. Montgomery, what is your occupation?

A. Consulting engineer specializing in water works problems, water supply distribution.

Q. For how long a period have you been an engineer?

A. I graduated from Ohio State University in 1920 and have been a practicing engineer since.

Q. Can you give us just a brief resume of your experience? [226]

A. I practiced engineering in Ohio, in the Middle West, until 1938, when I came to Southern California as consultant to the Metropolitan Water District in the design of the water softening plant

(Testimony of James M. Montgomery.)

in La Verne. I established my office in Southern California at that time and have been practicing here ever since.

Q. How large an operation is this office which you have here of which you have charge?

A. Oh, like all engineering offices, it varies somewhat, but at the present time approximately 60 employees.

Q. Can you state for us approximately some of the domestic and public water projects on which you functioned as a consulting expert on planning?

A. We have acted as consultant to such clients as the Metropolitan Water District, the City of Long Beach, City of San Diego, City of Santa Barbara, Ventura, Beverly Hills, Santa Monica, Burbank, Monrovia—I hate to sound like Jack Benny, but Anaheim, Azusa, and Cucamonga.

Q. And a number of others, is that right?

A. Yes.

Q. In the course of your work, is one of the problems you have been concerned with the matter of corrosion in cast iron water pipe?

A. That is true. [227]

Q. This has been true throughout your experience I take it?

A. We have always been concerned with corrosion, and particularly since we have known somewhat the causes of it.

Q. Mr. Montgomery, have you been down by Berth 59 and seen where it is physically situated?

A. Yes, I have.

(Testimony of James M. Montgomery.)

Q. You have been informed, have you not, that there was, on March 12th, a break of a water service pipe which came in from Signal Street, or it passed beneath Berth 59—

Mr. Yoakum: I don't suppose it was intentional, but you referred to the service line. It doesn't distress me, but I want you to keep to what you have said previously.

Mr. Verleger: Counsel, I think the term I have used is accurate.

Q. At any rate, you have seen the location where roughly this pipe failed and you were told there was such a pipe, is that correct?

A. That is true.

Q. You have also heard the testimony that this is an area where the soil is highly corrosive?

A. Yes.

Q. The question I would like to ask you is simply this. Do you have an opinion as an engineer as to whether the cast iron water pipe in question should have been—as [228] an engineering matter, should have been permitted to remain beneath the Berth 59 and the loading dock outside of it from 1914 to 1956?

Mr. Yoakum: That is objected on the ground it calls for a conclusion, no proper foundation has been laid.

The Court: This in an expert. That is the purpose of experts, to give a conclusion.

Mr. Yoakum: I know it, but I don't think

(Testimony of James M. Montgomery.)

proper foundation has been laid. He hasn't shown he has had any familiarity with the pipe, the make of it, the size of it, where it was laid. He just knows there was a pipe that was in the ground for a given number of years.

The Court: Does corrosion in any way depend on the size of the pipe? In other words, will a six-inch pipe corrode faster than an eight-inch pipe?

Mr. Yoakum: I don't know.

The Court: I don't know, either.

Mr. Yoakum: There has been no showing he knows anything about this pipe at all.

The Court: Maybe you'd better lay some foundation.

Mr. Verleger: I will ask him a few questions.

Q. You can assume, in addition to the facts I have stated before, that the pipe in question is an eight-inch sand mold cast iron pipe, the walls were approximately a [229] half inch thick, it led from Signal Street underneath Berth 59, beneath the loading dock and beneath the building itself, to a point just inside the door, where there was a riser and where it led to a lateral which went across the inside of the foundation of the building. Bear in mind this pipe in turn serviced a sprinkler main system inside, and also some fire hoses inside, and no other purposes.

Considering those facts, do you have an opinion as to whether or not the pipe in question should

(Testimony of James M. Montgomery.)

have been permitted to remain in highly corrosive soil from 1914 to March, 1956?

The Court: You can answer yes or no.

The Witness: I think it should have been replaced.

Q. (By Mr. Verleger): Will you state your reasons for your opinion?

A. The reason I think it should have been replaced is that it is in effect the same as a service line. It is a line which brings water into the building for fire protection purposes. It is unlike similar cast iron mains laid under the street where a break in the line would simply cause inconvenience, as a rule, and delays in traffic movement. In a building or a warehouse where goods are subject to damage, I feel just a short length of service pipe should be replaced. It can be done quite economically. Knowing the soil is [230] corrosive, I think it should have been replaced.

Q. Approximately when do you think it should have been replaced?

A. I don't feel they should wait until failure, but should replace it as soon as they know it is in corrosive conditions, because cast iron pipe is particularly vulnerable to this graphitic type of corrosion, and a leak in cast iron pipe always assumes great proportions because the pipe doesn't just leak, it breaks. Usually a piece comes out of it. Therefore, the general flooding takes place.

Q. Is the term hot area sometimes used for

(Testimony of James M. Montgomery.)

areas that are particularly subject to corrosion?

A. That is true.

Q. Used generally in the engineering trade in that context? A. Yes.

Q. Has the area of San Pedro Harbor generally been known in the engineering trade as a hot area for any period of years?

A. Yes. The harbor area in general is known as a hot area. I have acted as consultant to the City of Long Beach, and I know the soils in the Long Beach area are hot, and by reputation I know those in San Pedro are, too.

Q. How long has this knowledge generally existed, approximately? [231]

A. I have known about it in the harbor area since the early forties.

Mr. Verleger: No further questions.

Cross-Examination

By Mr. Yoakum:

Q. What is your degree in engineering?

A. My degree is in chemical engineering.

Q. Are you registered as a chemical engineer in California?

A. Registered both as a chemical engineer and a civil engineer.

Q. In these jobs you specifically enumerated, did you have anything to do with corrosion studies of pipes?

A. Yes, on a number of occasions we have.

Q. Taking them in the order in which you gave

(Testimony of James M. Montgomery.)

them, Mr. Montgomery, did you have anything to do with corrosion of pipes in connection with the Metropolitan Water District consultant work?

A. No, not at all.

Q. You were also consultant to the City of Long Beach? A. Yes.

Q. Did you have anything to do there with corrosion problems?

A. I have been consultant on that a number of times. [232]

Q. Did you specifically learn anything about the corrosion problems at Long Beach?

A. I will have to answer it this way. I learned specifically about the corrosion problems in Long Beach, but most of it through conversation with men with whom I was associated, particularly the corrosion conditions at Belmont Shores.

Q. Is that a separate city or is that a part of Long Beach?

A. That is a part of Long Beach.

Q. Was that what you have termed a hot area down in Belmont Shores? A. Yes.

Q. Have they had pipe in there down there for any long period of time?

A. They had cast iron pipe in there, which I believe I have a notation as to when it was laid. I am not real sure. Pipe was laid in the mid twenties and they had so much trouble from breaks in the pipeline due to graphitic corrosion that they replaced the entire gridwork with asbestos cement pipe.

(Testimony of James M. Montgomery.)

Q. When was that done?

A. When was the replacing done?

Q. Yes.

A. It was done, if I remember correctly, some five or six years ago.

Q. How much pipe did they take up, do you know? [233]

A. No, I don't. It was several thousand feet.

Q. Did you have any experience of a similar nature in your duties at San Diego?

A. Only a familiarity with the troubles in San Diego.

Q. Did they have a hot area, as you describe it?

A. Yes. They have several hot areas.

Q. Were you advised that they took up their pipe?

A. I don't know of them taking up any.

Q. What was your connection with Santa Barbara?

A. In Santa Barbara, our connection was design and supervision of construction of facilities. We had nothing to do with any——

Q. No corrosion problem there? A. No.

Q. What about Beverly Hills?

A. We had no reports at Beverly Hills.

Q. You mentioned Santa Monica. Did you get into any corrosion problems down there?

A. No.

Q. In Burbank, any corrosion? A. No.

Q. What about your three cities, Azusa, Anaheim, and Cucamonga, did they have corrosion?

(Testimony of James M. Montgomery.)

A. No. They are very fortunate. The soils there are not hot at all. Well, Anaheim has some hot soil, it is [234] true, but the other two do not.

Q. Is it correct to state that of these clients that you specifically enumerated, the only one involved in a corrosion problem that you got into at all was Belmont Shores area of Long Beach, is that right?

A. Of those that I mentioned, that is the one that specifically involved corrosion. However, there have been numerous other cities in which corrosion problems were involved.

Q. Where did you have any other clients where you had this so-called hot area trouble?

A. One of the worst is at El Centro, California. Another one that is extremely bad is Las Vegas, Nevada.

Q. Did you advise them to dig up their pipe?

A. Oh, no.

Q. Did they do it and replace it?

A. No. They did at El Centro. It was necessary. The corrosion was so bad there that they had to do it in a number of cases.

Q. Was their pipe that you dealt with down there cast iron pipe?

A. It was cast iron pipe.

Q. Of what vintage, what age?

A. Well, I don't know, and I don't want to convey the impression that I was employed by El Centro to investigate [235] their hot soil problem. I was designing a filtration plant for the city at

(Testimony of James M. Montgomery.)

the time and this problem came up and it was discussed very thoroughly, and I saw many samples of the pipe.

Q. But you had nothing to do with any removal of pipe in El Centro?

A. I had nothing to do with any removal of pipe. We merely had to design our new facilities so that we would not repeat the process.

Q. That was recently, was it?

A. That was right after the close of the war, about 1946.

Q. What did you do up in Las Vegas?

A. We have been engineers for the Las Vegas Valley Water System, Water District System, primarily since it was founded. We had to make an appraisal of the Las Vegas Land and Water Company's system for its purchase by the water district, and in making an appraisal of the system, we had to investigate the condition of the pipe. We found that large areas of the city, that the pipe had suffered so from graphitization that we had to cut down considerably on the expected life of the pipe. We found some very bad experiences with graphitization in Las Vegas, and particularly one main badly graphitized broke in front of the telephone building and caused considerable [236] damage.

Q. Is that the main out in the street?

A. Out in the street.

Q. How long had that main been in, from your examination?

(Testimony of James M. Montgomery.)

A. I believe it had been in since about 1935.

Q. That main caused damage even to the telephone company, though it was in the middle of the street, is that correct? A. Yes.

Q. Do you know of your own knowledge what was done with reference to that Las Vegas situation when that main broke?

A. They replaced enough pipe both ways from the break that it couldn't damage the telephone company the next time that it happened.

Q. But the rest of the pipe they left in, did they? A. That is true.

Q. You thought that was consistent with sound practice to leave it in? A. Yes, with a—

Q. When did you first see Berth 59?

A. Oh, I think it was about 10 days ago, maybe two weeks.

Q. Just at the end of September?

A. Yes. [237]

Q. How much time did you spend down there?

A. Oh, between two and three hours.

Q. Did you go into the berth, Mr. Montgomery?

A. Into the warehouses?

Q. The transit sheds. A. Yes.

Q. Did anybody point out to you where this break had occurred?

A. Pointed out to me where the pipe had been replaced in a new location, and it looked as if a new service had been put in. I am just judging by the way the street looked.

Q. I did not make myself clear. I want to know

(Testimony of James M. Montgomery.)

if anybody pointed out to you the approximate location of where this pipe was when it broke.

A. Yes.

Q. Who pointed it out to you?

A. Mr. Privett, one of the attorneys.

Q. And where was this?

A. It was where the elbow on the cast iron service line bent up to come into the building, where it came under the floor and up into the building.

Q. Was it pointed out to you as being a piece of pipe that was under the ground? A. Yes.

Q. And was it pointed out to you as being a vertical [238] piece of pipe or a horizontal piece of pipe?

A. It was my understanding that it was right at the bend, and I don't know whether it was vertical or horizontal.

Q. When you say it was your understanding that it was right at the bend, do you mean that it was in the elbow, that part of it was the elbow itself?

A. I should say close to the bend. I don't know.

Q. You don't know then whether it was a vertical piece or a horizontal piece?

A. No, I don't.

Q. Do you know how deep—were you told how deep the pipe was at the point where it broke?

A. Yes, I was told, but I don't remember.

Q. Does depth have any bearing upon your opinion about removing this pipe?

(Testimony of James M. Montgomery.)

A. I don't understand your question.

Q. If the pipe were a half inch or six inches under the ground as contrasted to being eight or nine feet under the ground, would those facts have any bearing upon your conclusion as to whether they should be removed?

A. No, I don't think so. I think that wherever it was, and I don't think it was any eight or nine feet below the ground, because we did open up the meter box and see what the depth of the fire service was. It seemed to be out in the street possibly three feet below the ground. Where it came [239] up into the building, I don't know exactly what it was, but I think it was just normal depth for a water service.

Q. Were you told by anybody as to what substance covered that pipe that broke?

A. No. We did some guessing on it. When I was a boy I worked one summer with the Standard Dredging Corporation taking soundings down in the harbor, and it was right in that immediate area, and I was trying to guess whether it was something pumped out of the bottom of the harbor, and we made some assumptions that it probably was, but I don't know.

Q. Were you given any information whether in addition to being covered by earth it was covered by any other substance?

A. No.

Q. If you knew it was covered by concrete floor, would that have any bearing upon your testimony here as to the desirability of removing it?

(Testimony of James M. Montgomery.)

A. I don't believe I understood your previous question correctly.

Q. Well, sir, I want you to understand it. You correct yourself.

A. I do know that there was a solid floor on top of the pipe, but I don't think that that would have any bearing on my recommendation that the pipe should be replaced in order to protect valuable materials in the building. [240]

Q. Is it your opinion that the pipe should be replaced irrespective of the depth that it was in the ground?

A. I think that could be carried to extremes.

Q. Yes. I didn't mean to put it that way, to dig an oil well or anything like that, or the bottom of a mine shaft, but what would you consider to be a depth at which it would be necessary to remove this pipe?

A. I don't think it would ever be laid at any depth that would make it unnecessary to replace it. I think from four to five feet is normal depth for laying such pipe, and that is what it probably would be in this case.

Q. If it was deeper than that, if it was laid deeper than that at the point where it burst, would that have any effect on your opinion?

A. It would have to be an awful lot deeper.

Q. What do you mean by an awful lot?

A. I am not going to say, because I don't think any pipe would ever be laid deep enough but what

(Testimony of James M. Montgomery.)

I think it should be replaced under occasional circumstances.

Q. Did you ever see the pipe that burst?

A. No, unless this is it (indicating).

Q. That is it, but I mean you have never seen it before you came in here? A. No.

Q. You say the reason that this pipe, in your opinion, [241] should have been replaced is because of its proximity to this loading shed. If it were out in the street, if I understood you correctly, you wouldn't recommend it being replaced, is that correct? A. No, I would not.

Q. It is just because it was close to that. Now, then, how far out from the loading shed would you have to go before you would feel you shouldn't have to replace it?

A. I think the principal point, place where damage could occur, would be after it went under the loading dock. From there on out to the main, I don't believe the chance of damage is so great, but after it gets in under the concrete structure, I think that is the pipe that should have been removed.

The Court: May I ask a question?

Mr. Yoakum: Yes.

The Court: In your opinion, whether the pipe should be replaced or not is based on the proposition of whether or not escaping water would cause damage?

The Witness: That is true.

The Court: And if it wouldn't cause damage, you wouldn't replace it?

(Testimony of James M. Montgomery.)

The Witness: No. Just wait until it broke.

The Court: While I am asking you questions, I want to ask another question. I want to ask you this one [242] before I forget it. In all your experience, have you ever recommended that cast iron pipe be replaced before there was any break in the pipe line?

The Witness: Only in the case of water service. I have recommended it in the case of water service going into important structures and buildings, but never in the case of a water main, a main out in the street.

The Court: In the water service, what do you mean by that?

The Witness: I mean the customer's connection to the water main.

The Court: The customer's connection?

The Witness: Yes, where the water comes into a building.

The Court: Is that based on the period of time the pipe has been in the ground?

The Witness: No. It is based more particularly on the soil conditions in which the pipe is laid and the materials of which the pipe is constructed. If the soil is, as we call it, hot, and if the pipe is cast iron, I feel that it should be replaced before there is a possibility of damage. I say cast iron, because cast iron is so brittle, and it is particularly brittle when it becomes graphitized, so you don't just have a leak, you have a deluge. The side of the pipe will give out. [243]

(Testimony of James M. Montgomery.)

The Court: Let's get back to my question. Maybe I haven't stated it correctly. In all your experience, have you recommended cast iron pipe be replaced before there is a breakdown purely on the ground that it was in hot soil?

The Witness: Yes, I have where it is a service line.

The Court: When was that?

The Witness: That is going into a building. That was at Las Vegas.

The Court: That was at Las Vegas?

The Witness: Yes.

The Court: And it was a service line going into a building?

The Witness: Yes.

The Court: Is that the only instance?

The Witness: That is the only instance.

The Court: Well, I notice it's 3:00 o'clock. I have interrupted counsel's line of thought. I think we will take the recess now. We will recess until 10 minutes after 3:00.

(Recess.)

Mr. Yoakum: Your Honor, may I put Mr. Ashline on for one or two questions and maybe we can finish with him?

The Court: All right. [244]

ROBERT R. ASHLINE,

recalled as a witness herein, being heretofore duly sworn, was examined and testified further as follows:

Cross-Examination

(Continued)

By Mr. Yoakum:

Q. Mr. Ashline, I am going to show you a page here out of a book that—what is this book?

A. That is the pipe location reports for December 1933 to August 1934.

Q. Of the City of Los Angeles Water Works?

A. Yes, sir.

Q. Is this one of your permanent original records? A. Yes.

Q. Do you have a sheet in here, filing No. 53,320, foreman's pipe location report?

A. Yes, sir.

Q. On the back of that sheet he has a little sketch of a street called Outer Street, and then extending westerly from Outer Street, what does that little sketch mean?

A. That is a drawing showing the limits of the street and the limits of that particular section of pipe that was laid at the time, the size of the pipe and the length of the pipe.

Q. Does it show anything about replacing or fixing [245] leaks in the pipe on either side of that street?

A. No, it doesn't. This is a new installation.

Q. Does this area that is shown on the back of

(Testimony of Robert R. Ashline.)

that sheet number that I mentioned depict the same area that is shown in Exhibit 28-A and encircled here on Outer Street just north of the West Channel?

A. Yes.

Q. Now what does that report state as to the kind of pipe that was put in there?

A. It states 659 feet of 8-inch cast iron Delbo pipe, class 250, 18-foot lengths.

Q. It was put in in 1934?

A. June 2, 1934.

Q. At that time was Delbo pipe a sand cast pipe or a metal mold?

A. That is a metal mold pipe.

Mr. Yoakum: Now, if your Honor please, if anybody wants it, we will have a copy of that sheet photostated and brought in. If you don't want it, we will let it go.

Mr. Verleger: I don't insist.

The Court: You don't want it?

Mr. Verleger: Not as far as I am concerned.

Mr. Yoakum: Do you have any further questions? That's all I have. [246]

Mr. Verleger: Just a second. No questions, your Honor.

The Court: May this witness be excused now?

Mr. Verleger: As far as I am concerned.

The Court: You may be excused.

(Witness excused.)

The Court: All right, Mr. Montgomery, will you take the stand again, please?

Mr. Yoakum: I am not sure just where I was in my interrogation. If I repeat a little bit, I ask everyone's indulgence.

JAMES M. MONTGOMERY

recalled as a witness herein, having been heretofore duly sworn, was examined and testified further as follows:

Cross-Examination
(Continued)

By Mr. Yoakum:

Q. Mr. Montgomery, you were told that this pipe was under the floor of a loading dock.

A. Was I told?

Q. Yes. A. Yes.

Q. The loading dock was outside of a transit shed, was it? [247] A. Yes.

Q. Did you observe a loading dock?

A. Yes, I did.

Q. And it was landward of the transit shed, wasn't it? A. That's right.

Q. Did you notice the surfacing on it?

A. It was concrete.

Q. I don't suppose you made any attempt to determine the thickness of the concrete, or anything like that, did you?

A. There was a joint between the vertical wall and the floor, which appeared to be some seven or eight inches thick.

Q. The concrete slab? A. Yes.

Q. How wide was this loading dock?

(Testimony of James M. Montgomery.)

A. I would have to guess. Probably 10 feet.

Q. Were you told how close the pipe was to the wall of the transit shed?

A. I was not told. I observed that it was fairly close, very close to the wall.

Q. What do mean by that, when you say fairly close?

A. Oh, probably within eight inches of the wall.

Q. I think you said that you did not know whether it was in an elbow or whether it was a vertical or horizontal [248] piece of pipe.

A. No, I don't know.

Q. Did you make any calculation as to the distance from where that pipe started to go up vertically into the shed and where it went horizontally to the main? A. No.

Q. How much of that pipe would you have cut off and replaced?

The Court: He is just making a guess. He didn't see the pipe. How could he say how much he would cut off or replace? The testimony is the pipe failed in particular spots. How would he know how much he would cut off?

Mr. Yoakum: I don't think he would, but I think we ought to be able to develop that.

The Court: How can he tell? He never looked at the pipe.

Mr. Yoakum: I don't see how he can tell, either, but he says in pipe like this you have got to replace it when it is hot.

(Testimony of James M. Montgomery.)

The Court: But he didn't say anything about cutting it off.

Mr. Yoakum: All right. If those are words that are deemed out of order, I will rephrase the question.

Q. You said that this pipe, if it was in a known hot area, considering where it was, it should have been replaced, [249] is that correct?

A. That is true.

The Court: May I ask a question?

Mr. Yoakum: Yes, your Honor.

The Court: You mean replace in toto?

The Witness: I think my recommendation would be that it be replaced, sir, all the way from the building out to where it connected to the fire main.

The Court: That would be complete replacement?

The Witness: Yes.

By Mr. Yoakum:

Q. How long would that have been? How many feet of pipe would we be talking about?

A. This again is an estimate, but it might be 100 feet.

Q. Did you know how many of these—would you call it a lateral? Would that be a correct term to describe this pipe that comes from the building out to what you call the fire main? Would you call it a lateral or a lead?

A. Our ordinary term for it would be a fire service.

Q. All right, we will call it a fire service lead.

(Testimony of James M. Montgomery.)

Were you advised as to how many of those fire service leads there were on Pier 1?

A. In the area that we were investigating, the three warehouses, I believe there were three separate services. I [250] wouldn't be certain of that, but I believe there were three.

Q. You just assumed that there were two leads into each warehouse. I will get that map and maybe it will be helpful. This map, Mr. Montgomery, has been introduced here in evidence. This is the transit shed at 57, and then I will point to the one at 58. Here is the one at 59. Then there is one at 60. That is to get you oriented. We are looking north up toward the top of this map. Now, then, this map shows that off of the fire main there are two fire service leads going into each of these sheds, so there would be eight of those leads. Do I understand that it would have been your recommendation that all of the leads be removed?

A. Yes.

Q. Then if the evidence shows that there were also leads going across to warehouses on the east side of Signal Street, fire leads, you would recommend that those also be removed?

A. I am not prepared to answer on the other side of the street. Out in the street the damage caused by a break would not be great. Here on this side of the street the only part that I looked at, the service is relatively short, and it seemed to me, as long as they should replace part of it, they should just replace all of it. I feel it should be done if they had known from the hot soil that it was in danger

(Testimony of James M. Montgomery.)

of rupture and should have been replaced the short distance [251] out to the main. If it were a real long service, I wouldn't think it was necessary to replace all of it, but in this case it was short and I think it should have been replaced.

Q. When do you estimate, in your opinion, that this replacement should have been made?

A. Obviously before the break, but I would say when they had warning they had hot soil conditions with cast iron pipe in the ground. I have known them to go out in less than 10 years.

Q. What year would you say, if you had been called down there as a consultant, would you have told them to take that pipe out?

A. I think about 1940 to 1945 is about the time everyone was cognizant of the fact that there was hot soil in that area, and at that time the service lines should have been replaced.

Q. You say that that pipe then should have been taken out after it had been in about 30 years?

A. Yes.

Q. Would that hold good with reference to all the pipe in the system that is similarly situated, that is, leads off of the fire lines going into the several warehouses?

A. Yes, I think that is true. [252]

Q. Would that be irrespective of the size of the pipe?

A. I think we would have to know the conditions in each case, but I am assuming they are similar to this. I say they should be replaced.

(Testimony of James M. Montgomery.)

Q. Any size? Would that make any difference?

A. I don't think the size would make any difference.

Q. You feel that it would be sound judgment to replace it even though you had to dig up a concrete floor and the ground into the earth seven or eight feet?

A. Yes, I do. You are going to have to do it eventually, anyway.

Q. And you would have replaced them all at the same time?

A. Or reasonably close together, so as not to interfere with operations.

The Court: Your opinion that replacement is necessary is based entirely on the question of time? You base the replacement of the pipe entirely on the question of time?

The Witness: Yes.

The Court: Not upon the failure of the pipe, but the fact that so much time had elapsed and the soil condition was such the pipe should be replaced?

The Witness: That is true. [253]

Q. (By Mr. Yoakum): Do you know by what process this cast iron pipe was made?

A. It was laid, I believe, in 1940.

Q. About, yes.

A. The only pipe available at that time was sand cast pipe.

Q. Do you know of any instances in your experience where pipes of this characted have been left in the ground for 42 years in hot areas?

(Testimony of James M. Montgomery.)

A. Pipe is quite erratic in its action. I know of cast iron pipe in hot ground that has given no trouble for many years, and yet another short length that will disintegrate or graphitize quite rapidly. For that reason, many times in making repairs to the mains, they will just take out an affected section and replace it with new pipe and get many more years' service from it.

Q. That is the practice, isn't it, generally speaking?

A. That is the general practice in water mains.

Q. You replace it when trouble develops?

A. That's right.

Q. In your experience, what is the longest you know of that cast iron pipe of this character has served, remained in service, particularly in hot areas? [254]

A. I managed a water company at one time many years ago that had cast iron pipe laid in 1852. Some of it was in hot soil. We replaced some of it. We thought it was defective pipe. At that time we did not know about graphitization. We replaced short lengths of it. The bulk of the pipe held up quite a while.

Q. When was it you did that, managed that company, Mr. Montgomery?

A. That was in 1926 and 1930.

Q. At that time you didn't know anything about this graphitic corrosion? A. Yes.

Q. How many years did that pipe last?

(Testimony of James M. Montgomery.)

A. Some of it is still in.

Q. Since 1852? A. Yes.

Q. I don't quite have it clear on this Las Vegas situation. I believe you testified a main in the middle of the street or in the street, in any event, gave way from graphitic corrosion and damaged a telephone company building that was opposite, is that right?

A. Yes. It was under construction.

Q. Did you have charge of the replacement for that project? A. No, I did not. [255]

Q. But you were familiar personally with what happened? A. I was familiar with it, yes.

Q. Do you know what size this main was?

A. I believe it was a 12-inch, I am not certain.

Q. They just replaced enough of that so that the new pipe would extend beyond each side of the telephone building, is that correct?

A. Yes, that's right.

Q. Did they replace anything else?

A. No. That was all they replaced.

Q. Then there was no service main or service line replaced there at all, was there?

A. The service line was not at fault in this case. It was a main in the street.

Q. But was there a service line connected to that main? A. Oh, yes.

Q. Was it of the same pipe, the same type pipe?

A. No. It was steel pipe.

Q. It was a different kind of pipe?

A. Yes.

(Testimony of James M. Montgomery.)

Q. So then there have been no instances where the service lines have been replaced that you know of, have there?

A. Only one place, as I say, that I have recommended, [256] and they didn't.

Q. You recommended it and they didn't?

A. They haven't replaced it yet, but I recommended they do so.

Q. Where was that?

A. That was in Las Vegas.

Q. I think you testified on direct examination that this pipe that is subject to graphitic corrosion finally gives way, it bursts forth, is that right?

A. That is ordinarily what happens. It sometimes eats through in a small spot, but ordinarily the trouble is it just gives way and the whole piece of pipe comes out.

Q. Can you tell us or do you have an opinion from looking at that as to what happened there?

A. No, I don't know.

Mr. Yoakum: Nothing further, your Honor.

Mr. Verleger: Nothing further.

The Court: May this witness be excused?

Mr. Verleger: Certainly, as far as I am concerned.

The Court: You may be excused.

(Witness excused.)

Mr. Verleger: Mr. Brennan, will you please take the stand? [257]

J. F. BRENNAN

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: J. F. Brennan.

Direct Examination

By Mr. Verleger:

Q. What is your occupation?

A. Mechanical engineer and consultant on depreciation problems.

Q. Will you state your experience and qualifications generally in that field?

A. Graduate of University of Michigan with degree of Bachelor of Science in Mechanical Engineering, and a professional degree, Mechanical Engineer. I am registered under the law of California as a mechanical engineer. I am a member of the American Society of Mechanical Engineers. I have had about 30 years engineering experience, five of which was in construction work, hydrographic survey, and topographical drafting. The remaining 25 years of my experience has been in the field of engineering economics, principally depreciation problems.

Q. By whom have you been employed? [258]

A. I have been employed by the City of Los Angeles, City of San Diego, Los Angeles Gas & Electric Corporation, Southern California Gas Company, the California Railroad Commission, Federal

(Testimony of J. F. Brennan.)

Power Commission, and by a number of smaller companies.

Q. Some of these employments, I take it, have been simply as consultant in these various fields?

A. That is correct.

Q. Who is your employer now, presently?

A. Presently I am employed by the Pacific Gas & Electric Company, San Francisco.

Q. How long have you been employed by them?

A. I have been employed by them since 1941, with the exception of four and a half years during which I was in the Navy, during World War II.

Q. In connection with your various employments in this field of work of yours, have you studied the field of corrosion as regards underground structures, particularly?

A. Yes. For over 20 years in connection with making depreciation studies, I have had a very great interest in corrosion of underground metallic structures. I have made numerous tests of pipe in the field. I have taken numerous soil samples and had them tested in laboratories. I have made any number of field trips to observe the actual conditions of pipe in service where the pipe had been exposed for [259] our inspection, for my inspection. I have some research work and I have published one paper on corrosion.

Q. Do you have any other publications which are generally relative to this particular field?

A. I have published a few papers on depreciation, but I will have to refer to my notes.

(Testimony of J. F. Brennan.)

Q. I don't think we need the particular titles. Just so I am clear, your particular field has been depreciation. Has this been a study of the actual rate at which things physically do deteriorate?

A. That is correct. My studies had for their object the ascertainment of the life and mortality characteristics of pipe, underground. I have analyzed a great deal of data, not only removal of pipe, but also measurements of corrosion, which I have made in the field for the purpose of determining the correlation between corrosion and the extent of pitting of pipe, the corrosivity of soil, and the time of exposure.

Q. Can you tell us whether there is in this field a substantial literature which is generally available to engineers who are generally interested in it?

A. Yes, there is an enormous literature in this field. The first reference I found was a paper delivered before the British Institute of Civil Engineering in London in 1940. They spoke there of phenomenon which they called the metamorphosis of cast iron pipe. The most extensive investigation is [260] reported in the literature conducted by our own National Bureau of Standards at Washington. They have been interested in this subject for 45 years, beginning in 1910. Their publication entitled *Underground Corrosion* appeared just last year. In 1945 they published a book, another book on underground corrosion, which summarizes the investigations which had been made up to that time.

(Testimony of J. F. Brennan.)

For a number of years they published a Journal of Research, Monthly Journal of Research, and in this appeared papers reporting upon the progress that they were making and what they were finding in the field of corrosion of underground structures over the entire United States.

Q. Have your own studies included the field specifically of corrosion in cast iron pipe?

A. Yes.

Q. Does this extensive literature exist with respect to the corrosion underground of cast iron pipe?

A. Yes, there is a great literature.

Q. As a matter of interest, are there available tables which show the behavior for various periods of cast iron pipe in various types of soil?

A. Yes. The National Bureau of Standards in its publications have from time to time given tables in which they have cited figures which can be used in equations to estimate the time in which puncture of pipe would happen. Other [261] tables have appeared in the literature. There is one that I remember by Mr. Alene, a chemist of Los Angeles, in which he attempted to correlate corrosivity of soil with life of pipe. Another investigator, Mr. Young, also a chemist, published tables. I have some material in my notes I could read if you are interested in numerical values of life of pipe.

Q. At any rate, for the moment I take it it is clear that such material does exist. Did this material exist for some time prior to March 12, 1956?

(Testimony of J. F. Brennan.)

A. The tables that I refer to of Alene appeared between 1931 and 1932. I was at one time a member of a technical committee for the Gas Association, and I know that work in that field was going on at the time to try to ascertain the life of pipe in relation to corrosion of soil.

Q. It would be fair to state there has been a steady stream of this literature about which you have testified from 1920 down to the present time, is that right?

A. That is correct, yes.

Q. After March 12, 1956, did you come down here and look at Berth 59 and its vicinity?

A. Yes, sir.

Q. Can you give me the approximate date you came down?

A. It was on the 1st of June, 1956.

Q. Can you tell me what you did? [262]

A. Upon arrival in Los Angeles, I went immediately to Pier I, Berth 59, San Pedro, on the 1st of June, 1956. There I saw the consequences of what had been reported to me as failure of an 8-inch cast iron water main. Inside the pier shed at Berth 59 I noticed that there had been collapses in several places of the concrete deck, large holes.

Mr. Yoakum: I think that is immaterial here about some collapse.

The Court: I think that is probably true.

Mr. Yoakum: In June, 1956. We were not litigating then.

The Court: It is probably true about the collapse of the wall.

(Testimony of J. F. Brennan.)

Mr. Verleger: I think I will connect that up in a moment. I don't expect to ask any opinion about the collapse of the floor. I think it will explain how the witness was able to get a soil sample.

The Court: All right, go ahead and connect it up.

Q. (By Mr. Verleger): Will you tell us what you did and what you saw?

A. I saw that the fill under the floor, the earth under the floor had been disturbed considerably. I was told it was by a stream of water and it certainly appeared so.

Mr. Yoakum: I move to strike what the witness was told. [263]

The Court: It may go out, what he was told. Tell us what you did and what you saw.

The Witness: I took soil samples from the soil in the holes at Berth 59 near Door No. 17. I noted the spot numbers on the bulkhead. I think it was spot 71 and 72. I took several pounds of earth in each sample and took three samples from there.

Q. (By Mr. Verleger): You took three samples from beneath the slab at Berth 59, is that right?

A. Yes, sir.

Q. Did you take any samples in the street?

A. Yes. I noticed an excavation in progress on the inboard side of the pier in Signal Street, and I thought it might be illuminating to test that soil, so I took a sample from that excavation in Signal Street. It was about a depth of three or four feet.

All of these samples, including this last one, I

(Testimony of J. F. Brennan.)

packed in waterproof bags, and I put those inside of outer containers which I tied up and initiated with the date and time and place. Those I brought to Los Angeles, packed them in a carton, and sent them to my office in San Francisco. Later I took those to Emeryville to a laboratory for soil test.

Q. In addition, while you were at Los Angeles, did you [264] go to the yard of the Outer Harbor Dock and Wharf and have a look at the piece of pipe involved? A. I did.

Q. When you got back up to Emeryville, did you take the samples of soil and conduct any tests with respect to them? A. Yes.

Q. Will you tell us what you did with respect to them?

A. I made what are called Corfield corrosivity tests. The Corfield test is made by filling a small can with the soil to be tested, and into that can inserting what is called a standard pipe nipple. It is a steel pipe $\frac{3}{4}$ -inch size. The soil is taken from the sample which is to be tested, packed in there, moistened, and then a direct current potential is impressed upon a circuit of which the can forms one side, the soil, the conductor and the pipe and the other conductor. The current is made to flow through this circuit for a period of 24 hours. The pipe corrodes and loses weight in accordance with the corrosivity of the soil. The test is let to run for 24 hours and the loss of weight of that pipe nipple as measured in grams is then designed as

(Testimony of J. F. Brennan.)

the Corfield corrosivity index. I made tests of that kind on these samples.

Q. That is a method, I take it, of ascertaining the corrosivity of the soil within a reasonably short space of [265] time, is that right?

A. That is correct.

Q. Samples of soil that you took out from under the slab of Berth 59, what was the physical appearance of those samples?

A. They were gray to black in color. They consisted of sand, some clay, and adobe mixed, and of course they were wet and lumpy.

Q. Will you state what you found with respect to the corrosivity of these samples when you tested the same?

A. I found the corrosivity index average for the three samples taken from inside Berth 59 to be 6.5.

Q. Is that a high or a low corrosivity?

A. That is a very high corrosivity index. On the Corfield scale that index of 2 to 3 is designated as bad soil, 3 to 4 is designated very bad soil, so an index of 6.5 would mean an extremely corrosive soil.

Q. I think you stated that you saw the particular piece of pipe involved in the Harbor Department's yard. Were you able to identify the type of pipe it was?

A. Yes. I saw several pipe at the yard there.

Mr. Yoakum: May I ask a question on voir dire?

The Court: Yes.

(Testimony of J. F. Brennan.)

Mr. Yoakum: How did you know that the pipe you saw at the yard was the pipe that burst? [266]

The Witness: I am coming to that. I was going to explain that.

The Court: Answer the question. How did you know?

Mr. Yoakum: Just tell me.

The Witness: The pipe that I saw was marked, identified by crayon with a marking Berth 59, and I spoke to Mr. Gad, or the superintendent of the yard, and I asked him where this pipe had come from. He said it came from Berth 59, Pier 1, and it was brought in here in March, 1956.

Q. (By Mr. Verleger): Now, will you state what you observed with respect to that pipe?

A. There were several pieces of pipe and one elbow. It was eight-inch cast iron pipe. In one pipe there was a great hole which I assume was the hole—a hole as big as a man's hand. I observed that the pipe was rusty, the surface had disintegrated to some extent practically over the entire area. I tried to determine what the original wall thickness of the pipe could have been. My measurement, however, was not very successful. I measured about approximately one-half inch, but in the manufacture of these pipes there is a tolerance allowance in thickness so that I did not get a highly precise estimate, but I judge it to be approximately one-half inch thick. [267]

Q. Did you observe anything with respect to the graphitization of the pipe?

(Testimony of J. F. Brennan.)

A. Yes, I did. I borrowed a hammer and chisel from an employee in the yard and I tested the surface of the pipe in many places, and in several places I found it completely graphitized through the entire wall. At other places it was graphitized up to within a sixteenth or an eighth of an inch of the interior surface. There was surface graphitization on many areas. There were some where there was only a light coating of red rust. This I attribute to the fact that the pipe had been laying in the yard for some time before my inspection. One of the characterizations of graphitization is that the black oxides of iron are held in suspension in graphite flakes, and the reason they are black oxides is because not enough air is available, not enough oxygen, where there is a concrete covering over a trench, to permit full oxidization, and when the pipe gets in contact with the air it is further oxidized to a ferric oxide state, something like the appearance of this pipe here.

Q. Do you have an opinion based on your personal study and also on your familiarity with the literature as to the probable life of an eight-inch piece of black iron pipe of the type under Berth 59 which you saw there in the soil, which you analyzed? Do you have an opinion as to how long the probable life of such a piece of pipe is? [268]

A. Yes, I have an opinion.

Q. What is that life?

A. Under the conditions I observed there, having in mind the soil tests that I made and the type of

(Testimony of J. F. Brennan.)

covering over the pipe, the fact that it is cast iron pipe, it is my opinion that one could expect complete graphitization in certain places on this pipe in 25 years.

Q. Will you explain, giving the reasons for your opinion?

A. Yes. I would like to say, first of all, that when I say an expectancy of 25 years, I don't wish to imply there is anything like the very high precision that attaches to an estimate of that kind. The phenomena of corrosion are of a statistical nature. There is a great variance in the effect that one finds in not only the soils but the action of pipe to them. To understand this, perhaps it might be well for me to explain what I mean by graphitization. All corrosion, at least underground corrosion, is of an electrochemical nature. Small galvanic couples when two metals are immersed in a fluid, salt water, or any fluid, any electrolyte, or any fluid that will pass an electric current, little galvanic couples are set up and your current flows between them. One of them is a positive electrode, which is called a cathode, and one of them is a negative electrode called an anode, and current flows from them and it carries with it [269] some of the metal. The metal really goes into solution.

Now, there must be liquid present, water, and a certain amount of oxygen for this process to continue. In the cast iron pipe itself there is, first of all; iron, ordinary iron. Then there are graphite flakes and then there is another substance called

(Testimony of J. F. Brennan.)

cementite, which is a mixture, a compound of iron and carbon. Now, the graphite itself is electro-negative to iron, so when an electrolyte is present, many galvanic couples start to work in there to corrode the iron.

Now, the reason I say these things are of statistical nature is this. We don't know just where water is going to be present. Usually it is near the bottom of the pipe. The corrosion is at times near the bottom of the pipe.

Furthermore, with regard to cast iron pipe, sand cast pipe, there is, as was stated, a small silicate covering which comes about through the manufacture. Usually that is destroyed, that is, broken in handling. It is more usual than not to find it broken. Where it is broken, corrosion tends to concentrate.

It is not necessary that we have two different metals present. Two different spots of the same piece of cast iron can form a galvanic couple by reason of the fact that one of them may have physical properties varying slightly from the other. [270]

So that the life, estimated life of the pipe, can be stated only as a mean between certain bands. In other words, when we make an estimate, we should state with it also what is called a standard deviation, a standard error of the estimate. In my mortality studies on pipe, it has been my observation that the standard deviation of an estimate of this kind is of the order of about three-tenths to four-tenths, and sometimes a half of the mean.

(Testimony of J. F. Brennan.)

Therefore, following the laws of probability, about two-thirds of all failures of cast iron pipe in a corrosive environment such as this would occur between the ages 10 and 35 years with a mean of 25.

Q. Will there be any continuation of this corrosive process after this 35-year period? Is it something that stops or is it something that goes on?

A. Yes. If you subject, say, a thousand samples—again, when I say this is of a statistical nature, I am saying this is what happens in the long run, and this is what we must anticipate—if you took a thousand samples and put them in the same environment, you would ordinarily expect two-thirds of the failures between age 10 and age 35. Beyond age 35 you would expect one-sixth of them to fail.

Q. Now, is the only method of checking to see if such failures have occurred to wait until water appears on the surface? A. No. [271]

Q. Will you explain why or why not?

A. Because of the nature of these phenomena. Cast iron has another property that I would like to talk about before I answer that question, counsel. I spoke of graphite flakes as being one of the constituents of cast iron. These flakes hold the corrosion in place so that the pipe from the surface will—that is, to the eye the pipe will appear to be in very good condition, retain its original shape, even retain the markings of the original pipe, and as an example, this pipe that I saw at the material yard still had markings on it, USCIPF Company, which is United States Cast Iron Pipe and Foundry

(Testimony of J. F. Brennan.)

Company, and gave the date, 1913, when it was cast, and it gave the place where it was cast, Burlington. Burlington is a city in New Jersey where the Cast Iron Pipe and Foundry Company has a foundry.

Now, one may be deluded into thinking that this pipe was good pipe if he just simply gives a casual inspection, but if he takes a hammer and chisel he will soon find out that it is brittle, it has lost weight, lost specific gravity, it can be fractured with a light tap of a hammer, and that the settlement of the earth, seismic disturbances, earthquakes, water hammer, any kind of a shock, will break it. It is definitely a hazard.

So here we have, according to my estimate, a life of 25 years, and the possibility, the probability of one out of [272] six that it would fail before the age of 15. That is a very high chance for a designing engineer to take, I would say.

I don't know whether I have answered your question.

Q. You mentioned a chance of 1 to 6 when the pipe was 15 years old. This pipe, I think, was installed in 1914. The break took place in 1956. By that time how high would the probability of the failure have become?

A. Well, according to my estimate of 25 years, I could determine that. It would take a little calculation, but under a normal probability distribution that could occur, the pipe could last that long, but the probability that it would not would cer-

(Testimony of J. F. Brennan.)

certainly be well over 90 per cent. Nine chances out of ten that it couldn't last that long.

Q. Now, bearing in mind the literature in this field developed, do you have any impression of the time at which a competent engineer should have recognized the failure of this pipe as a probability? By the time I mean the date.

A. Well, there is certainly in the literature enough to serve as a warning to an engineer who knew these particular circumstances that failure of this pipe could be expected by age 15 years, with a probability that no designing engineer would want to assume in a structure. With that knowledge of the literature that has been available for the last 20 years, 25 years, an estimate of 25 years is very optimistic.

Q. Just so I am clear, for the past 20 years there has [273] been literature available from which a competent engineer could make this determination, is that right? What I am getting at is, how long has the literature been available on the subject, rather than how long the pipe lasted?

A. That is difficult to say. As I say, the Bureau of Standards started its investigation in 1910. A lot was said about corrosion of cast iron prior to that, but how much was reported in literature, I don't know. I happened to be working on some technical matters so I was interested in corrosion at the time. I did a lot of reading on it. I think a person who would be interested in it could have known by certainly 1935 that corrosive failure of this line was imminent.

(Testimony of J. F. Brennan.)

Q. I take it it would not be unfair to say the literature has been available since 1945?

A. Long before that.

Mr. Verleger: We have no further questions, your Honor.

The Court: I suppose the cross-examination will be rather extensive?

Mr. Yoakum: There will be some, yes. I don't know that we ought to try to do it today.

The Court: If you can finish by half past 4:00, we will continue.

Mr. Yoakum: I rather doubt it. [274]

The Court: May I inquire from counsel how many more witnesses you will have?

Mr. Verleger: Your Honor, this is our last witness. We have one other man we could call simply on the question of the relationship between Grace Line and Grace Co., Inc. That is covered in our interrogatories, so we don't need to call anybody else.

The Court: I think possibly we better recess rather than try to hurry through this cross-examination. This is an important witness and we don't want you to feel you have been denied full cross-examination because of the running of time.

Mr. Yoakum: Thank you, your Honor.

The Court: Time seems to be an element in this case.

We will take the recess now then. We will recess now until 10:00 o'clock tomorrow morning.

(An adjournment was taken to 10:00 o'clock a.m., Thursday, October 9, 1958.) [275]

October 9, 1958, 10:00 o'Clock A.M.

The Clerk: No. 20624-HW Civil, Grace & Co. (Pacific Coast) vs. the City of Los Angeles, further trial.

Mr. Yoakum: Ready for the defendant.

Mr. Verleger: Ready for the plaintiff, your Honor.

The Court: All right.

Mr. Yoakum: If your Honor please, our witness is not here yet. I guess he was in a partial state of disheville when we called him, but we want to put Mr. Ashline back on to identify the water analysis he made.

The Court: That's all right. You can put him back on.

Mr. Yoakum: He is going to come in, but I will proceed with Mr. Brennan until he comes.

The Court: All right, then you can proceed with Mr. Brennan.

JOSEPH BRENNAN

resumed the stand and testified further as follows:

Cross-Examination

By Mr. Yoakum:

Q. Mr. Brennan, are you familiar with the American Society of Corrosion Engineers?

A. I know there is such a society, yes.

(Testimony of J. F. Brennan.)

Q. Are you a member of that society? [278]

A. No, sir.

Q. Have you ever been? A. No, sir.

Q. Did I understand you correctly to say that you were more or less of a specialist in engineering economics—is that the term you used?

A. Yes, sir.

Q. Just what does that embrace?

A. That encompasses among things, studies of depreciation, the field encompasses those problems in which an engineering decision is to be made as to which plan of construction, maintenance, and operation will in general minimize costs. Since one of the most speculative of the elements in a problem of that kind is the depreciation, that is usually the one which gets the greatest attention.

Among other costs, of course, are the interest on the investment, the depreciation accruals, the taxes, property taxes, income taxes, maintenance and operating costs. The problems of this nature that are referred to me are whether or not it would pay to put leak clamps on a cast iron system of mains or whether it would be more economical to replace them entirely, whether to build a hydro-electric plant or a steam generator plant. Problems of that nature.

Q. Is it fair to say that this science, if you call it that, is not an exact one? [279]

A. No science that has to do with prediction, and essentially those problems are ones of prediction, can be called an exact science. In fact, it is

(Testimony of J. F. Brennan.)

recognized today that all science comes under what I have described as a statistical nature, even the science of mechanics. The classical treatment of mechanics, celestial and terrestrial, by Newton, was a principle of determinism.

Q. Let's not get into that. Then this is not an exact science and is subject to many hypotheses and assumptions, is it not?

A. I couldn't say as to that, no.

Q. Do you consider that there are many probabilities involved in these calculations?

A. There are many probabilities in these, as there are in most scientific and engineering calculations.

Q. Let's not get into the others. Just let's stick to these engineering economics as it applies to depreciation.

A. I want to emphasize that this is not something peculiar to my work.

Q. Is it a field in which there is a wide diversity of opinion?

The Court: You know, I think every field has a wide diversity of opinion. If I get three lawyers together, we have a wide diversity of opinion on pretty near everything. [280]

Mr. Yoakum: I will certainly buy that. But I wondered if everybody agreed with Mr. Brennan here in his opinions that he stated yesterday in reference to these depreciation matters or is there an area of diversity.

The Witness: Yes, there is.

(Testimony of J. F. Brennan.)

Q. (By Mr. Yoakum): When did you work, or were you employed, perhaps is a better term, for the City of Los Angeles?

A. I was employed as a topographical engineer by the Engineering Department of the City of Los Angeles in 1927.

Q. Did that have something to do with map making, or what did you do? A. With what?

Q. With map making, laying out topography or like that, or what did your duties consist of?

A. I took the notes that were brought in by the surveyors, and made the drawings showing the traverses that they had covered, the calculations for traverse closures, and the location of underground structures.

Q. Did this work have to do with underground structures?

A. Principally underground structures.

Q. It didn't have anything to do with making decisions on the type of materials that were to be used, did it? [281] A. No, sir.

Q. In other words, to put it more bluntly, you were drawing plans of some kind, is that what it amounts to? A. That's right.

Q. How long did that last?

A. I was there for one year.

Q. 1927 to 1928, is that about it?

A. As I recall, yes, sir. Not all of my work was in topographic drafting. I took a civil service examination while I was at this place and they pro-

(Testimony of J. F. Brennan.)

moted me to assistant civil engineer, where I had a little design work, principally in storm sewers.

Q. That was concrete materials?

A. Yes, those were principally concrete pipes.

Q. Was that any particular department you worked for then?

A. Yes. I worked for Mr. Armstrong who was—it was under the City Engineer.

Q. The City Engineer's Department?

A. Yes.

Q. Was your next employment with the City of San Diego?

A. No, my next one was with the Los Angeles Gas & Electric Corporation.

Q. What period did that last? [282]

A. I was there approximately three years.

Q. That would be 1928 to 1931? A. 1930.

Q. 1928 to 1930? A. Yes.

Q. What was your position there?

A. My payroll title was assistant valuation engineer.

Q. What was your job or duties?

A. Well, I was assistant to the head of the department. We had at one time about 75 to 80 people who made a complete survey of the company's gas properties, and estimates of accrued depreciation.

Q. In connection with that job, did you figure depreciation on gas mains? A. Yes, sir.

Q. Are gas mains primarily of cast iron?

A. Some cast iron, yes, sir.

(Testimony of J. F. Brennan.)

Q. Were there some in this system that you evaluated? A. Yes, sir.

Q. Or appraised for depreciation purposes?

A. Yes, sir. Let me put it this way. I made depreciation studies. Many of them are in the nature of research, and a great many of them that I made are not in any way entered on the books of the company. They are just for management's information. [283]

Q. Well, was it part of your job to assign remaining life to cast iron pipe?

A. Not at that time, no.

Q. At any time while you were with the Los Angeles Gas & Electric Company, did you have any such job as that?

A. To estimate probable lives, yes, sir.

Q. Were those matters that went into the records of the company? Were they just theoretical studies?

A. They are theoretical studies which derive from the records of the company.

Q. What did your studies indicate as to how long the Los Angeles Gas & Electric Company had gas mains in the ground?

A. How long they had had them?

Q. Yes. A. I don't recall.

Q. Do you have any recollection as to what your conclusions were as to remaining lives on these pipes? A. No, sir.

Q. Do you recall of any that had been in the ground 50 years?

Mr. Verleger: That would be objected to, your

(Testimony of J. F. Brennan.)

Honor, on the ground that the witness has already answered he doesn't recall.

The Court: Overruled. [284]

Q. (By Mr. Yoakum): You may answer. Do you want the question repeated? Can you recall, addressing your mind specifically to it, of any pipes that have been in the ground as long as 50 years at the time you were making your evaluation studies?

A. I don't recall, but it certainly wouldn't surprise me if they had been.

Q. After you left the L. A. Gas & Electric, where did you next go, Mr. Brennan?

A. I next went abroad. I went to Paris and studied at the University of Paris, the Sorbonne.

Q. For how long? A. One year.

Q. Then I take it you returned here around 1932? A. In 1932.

Q. Would that be about right?

A. Yes, 1932.

Q. Where did you go then?

A. I then went with the Southern California Gas Company.

Q. How long were you with them?

A. I was hired for one specific job and I was with them, I think, seven months.

Q. What was the nature of that job?

A. I was engaged to make a reproduction cost new and [285] value determination of their properties.

Q. Reproduction cost new, that is figuring what

(Testimony of J. F. Brennan.)

it would cost to replace brand new certain of these assets that you were studying, right?

A. Yes, sir.

Q. Did that include cast iron pipe?

A. Yes, sir.

Q. What was the other aspect of your duty assignment there? To study the depreciated value?

A. Yes, sir.

Q. Did your work on the job encompass studying life of cast iron pipe that was in the system of the Southern California Gas Company?

A. Yes, sir.

Q. What did you find out as to the length of time that some of their cast iron pipes had been serviced?

A. I don't recall. Let me say that I have made hundreds and hundreds of these studies of this kind in the past, and this is going back 25 years or more, and I can't recall.

Q. Would you be able to say, as you did with respect to the L. A. Gas & Electric, that probably at that time there had been pipe, cast iron pipe in service as long as 50 years?

A. Yes, undoubtedly.

Q. Did you make any recommendations as to whether that pipe should be replaced? [286]

A. No, sir.

Q. Was that any part of your assigned duty?

A. Not at that time, no, sir.

Q. Not with the Southern California Gas Company?

A. No.

(Testimony of J. F. Brennan.)

Q. No part of that job at all?

A. No, sir. My job was to determine the value of the plant for rate litigation purposes.

Q. For rate fixing purposes? A. Yes, sir.

Q. Do you remember with respect to these pipes that had been in for 50 years, did you assign any remaining life value to them?

A. I did, yes. I had to, of course, to determine value. I had to assign average life, mean lives, that is to say, and to ascertain the age, to ascertain the type of mortality, and from all of that to deduce what is the life expectancy of the present pipe. All of those matters are concerned in an estimate of accrued depreciation.

Q. With these pipes that had been in service as long as 50 years, do you recall what remaining life you assigned them?

A. No, I don't, because that would require that I recall the type of dispersion. I tried to explain yesterday that there is dispersion of failures to make a mean life, and [287] this is very important in estimating future life expectancy. It is analogous to the case of a human being. We use the same equations, incidentally, as are used by actuaries in the analysis of human mortality. In an analysis of a large map of these data, we find a marvelous conformity to the mortality characteristics of human beings. As I say, we use the same equations, but different parameters. The type of equation determines the shape of the curve, but the valuation of the constant parameters in those equations are

(Testimony of J. F. Brennan.)

what tells us whether the curve moves over, whether it is flat, or high peak, and so on.

I would have to recall, to answer your question, not only the average, the mean life of those pipes, but also the type of dispersion. As I say, I have run hundreds of these curves, and to recall, to single out one particular one, would be impossible for me without reference to data.

Q. Did you find out in your studies for the gas company that some of their pipes were in soils with high corrosivity indexes or severe corrosivity?

A. Yes, some were.

Q. They had been in there a good many years, had they not?

A. Some of them had, no doubt.

Q. With reference to those that had been in there, say 50 years, do you recall whether you determined that they [288] had no remaining life for your rate purposes?

A. Well, that is a question that embraces a sort of mutually exclusive proposition there. No remaining life. You might say if a man has an expectancy of 65 years, he doesn't drop dead at 65. If he reaches 65, his life expectancy is five years.

Q. You wouldn't throw him away, but on this pipe you talked about at the Harbor yesterday, as I understood your testimony, at the end of 25 years you are going to junk that pipe, aren't you?

A. No, sir. I didn't either express or imply that.

Q. I evidently misunderstood you. We will get to that later.

(Testimony of J. F. Brennan.)

Where did you go after you left the Southern California Gas Company?

A. I went with the City of San Diego.

Q. What was your position there?

A. I have forgotten my exact title.

Q. Well, your duties.

A. My duties were to assist the City of San Diego in preparing an action before the California Railroad Commission in an attempt to show that the rates for service, their gas and electric rates, could reasonably be lowered. I was charged with the duty of determining value of gas plants.

Q. How long were you employed with the City of San [289] Diego, approximately?

A. Well, I was there from—about eight months on the job, and then when the hearings were held in San Diego, I had to come back several times.

Q. You worked there into the year 1933?

A. Into the year 1934.

Q. I thought you left the gas company in 1932 about the fall and then went there.

A. No. I left San Diego in March, I believe, of 1934.

Q. All right, sir. Then you came back to testify when they had the hearing before the Public Utilities Commission, is that right?

A. Yes, sir.

Q. What was your study?

A. To determine the value of gas plants.

Q. The City was seeking to lower their rate, is that what you said?

(Testimony of J. F. Brennan.)

A. Yes. I think the action was instituted on the Commission's own motion and that the City Attorney appeared as an intervenor, I guess you would call it. I worked with the City.

Q. What I am trying to find out is, was the City trying to sustain a gas rate and was it resisting a proposed decree that the Commission was——

A. No. The City wanted the Commission to lower rates. [290]

Q. To lower rates? A. Yes.

Q. In that job, did you make a study of the City's underground piping? A. No, sir.

Q. That job had nothing to do with underground piping? A. The job did, but my duties didn't.

Q. I mean you didn't get into that matter of underground piping in any way on that particular assignment?

A. I will have to withdraw my statement. I got into the matter of underground piping that was located at the gas plants and used in the manufacture of gas, but not in the underground piping in the distribution system of the company.

Q. In connection with that job, did you ascertain the length of time for which their cast iron pipes had been in use?

A. We had some men who went through the company's records, and that information was developed there, but I don't recall anything about it.

Q. Did it come to your attention that they had cast iron pipe in their system for as long as 50

(Testimony of J. F. Brennan.)

years? A. As to that I couldn't say, counsel.

Q. You don't know. After you left there, did you work for the Railroad Commission or the Public Utilities [291] Commission?

A. No. My next employment was with Pacific Gas & Electric Company.

Q. Over what period of time was that, Mr. Brennan? A. 1934 to 1937, three years.

Q. Was your office in San Francisco?

A. Yes, it was in San Francisco.

Q. What was your job assignment there?

A. Well, I was engaged to make a study of depreciation of the company's gas properties. That included all of their underground system, distribution, transmission mains, and—well, the entire property, gas property.

Q. Then this study here did specifically include underground transmission mains for the gas company? A. It did, yes, sir.

Q. Were a considerable portion of those mains of cast iron pipe? A. Yes, sir.

Q. Have you any idea of the number of miles in the system at that time?

A. I did know that figure, but—are you speaking only of cast iron now or total mileage?

Q. Yes, because there is no need of getting into any other kind of pipe, as far as I can see in this case, but cast iron pipe. [292]

A. Yes. We had a considerable amount of cast iron in San Francisco, Oakland, Sacramento, San Jose, Eureka, and others, Salinas—no.

(Testimony of J. F. Brennan.)

Q. What would be the size of that pipe in the mains, somewhere between six and twelve inches?

A. Oh, no. It goes up to 36-inch cast iron.

Q. You did go down, I suppose, to six or eight inches?

A. Oh, yes, sure, four inches, I think, also.

Q. In those areas were severe corrosivity problems encountered?

A. Yes, very severe along the Bay and anywhere near, contiguous to salt water.

Q. Was the purpose of this study for a rate case?

A. This was a case in the Northern Division of the District Court on Appeal from the decision of the Commission. There was a Special Master in Chancery appointed.

Q. But it was in connection with a rate case, is that right? A. Yes, sir.

Q. I assume, unless you tell me differently, that P. G. & E. was trying to have a higher rate sustained? A. I think it was to resist a rate cut.

Q. It was trying to maintain the existing rate as against the Commission's suggestion that it should be reduced? [293] A. Yes, sir.

Q. In the transmission of gas, it is at least as important to have good, safe gas pipes as it is in the case of the transmission of water, is it not?

A. Yes, sir.

Q. As a matter of fact, you consider that gas is a much more dangerous substance if it escapes than water? A. It is.

(Testimony of J. F. Brennan.)

Q. What did you find out about the length of service of the P. G. & E. mains—I will stick to my question that it is cast iron mains now, when you made this study in the middle thirties?

A. We had cast iron mains that had been in service for a very, very long time.

Q. Can you give me just approximately in years? That is a pretty general term, very, very long time.

A. I am trying to recall just what the oldest main was that we had then. I am quite sure some of it dated from the 1890's.

Q. Would that be generally throughout the Bay area? A. Well——

Q. This pipe that dated from the 90's?

A. No, sir.

Q. Where would it be located?

A. It would be located in those areas that were favorable [294] to the survival of cast iron that long.

Q. Is it your testimony that the—of course, I don't imagine that pipe in San Francisco had been in since 1890, in view of the earthquake and fire, but what about the situation in the other Bay areas, such as Alameda and Oakland or Richmond or Emeryville? Was there none of that old pipe in there?

A. There was cast iron pipe in Oakland, and parts of it were quite old.

Q. Back as far as the '90s?

A. I can't say. I recall one instance there. I

(Testimony of J. F. Brennan.)

was trying to find out the oldest piece of pipe in the system at Oakland and I asked a couple men to investigate it. One of them brought me back a little piece of paper and it was an order to install a piece of cast iron main, and it was dated 1866, and it said, "Run 4-inch cast iron main out to Dr. Jones' house."

I asked the men to go out there and see if they could find that pipe and they were not successful. I wanted to investigate that to see what condition it was in, but we couldn't find it. There was no record of its removal.

Q. On this cast iron pipe that had been in service since 1890, did you assign any remaining life to it?

A. Only as a composite in which that was thrown in with a great deal of other pipe.

Q. You probably reached some mean or average figure in [295] your over-all conclusion, but you had to take each separate piece in order to reach this composite, didn't you?

A. No. The way we reached this composite is this. We go back over the records of pipe installed and pipe retired or failed, taken out of service, and for pipe existing at each age we match up the amount that was exposed to risk of retirement at that age, the amount that actually failed at that age, and from those two figures we determined the ratio which is called a mortality ratio for that age. Then we do that for all pipe in service. Of course, naturally, we don't do it, we couldn't afford to do

(Testimony of J. F. Brennan.)

it for each piece of pipe in the system. So we select a representative division. We selected East Bay, which embraces, Oakland, Alameda, and some of those towns that you mentioned.

Having developed those ratios, we then assume an installation, say of a million feet, and applying those ratios successively to that million feet, we reduce it and we get survivors at each age out of the million that we started with. With those survivors we then fit to that data a mortality equation, such as the Gompers equation or the Makin equation, and that is fitted by mechanical means, and it is projected out beyond the range of your experience, you see?

Q. I don't want to be discourteous, but you just completely lost me, because I don't understand those things. [296] But on an old piece of pipe, you had to give it some value or give it no value.

A. The process that I was trying to describe is a necessary step toward reaching that conclusion.

Q. But my question is, did you give the old pipe, this 1890 pipe that had been in service around Alameda, did you give it some remaining life value?

A. Yes.

Q. Can you tell approximately how much life you would give at that time to a pipe that had been in service over 40 years?

A. You speak of a specific piece of pipe. I cannot tell you unless you give me all of the conditions as to its environment in the soil, a soil test, the moisture, the amount of vegetation, which is im-

(Testimony of J. F. Brennan.)

portant in these problems, the age of the pipe and its depth, whether or not there is pavement over it, whether it is on a slope where the drainage is good, whether it is a clean sandy soil that will pass water, and out of which salts have been leached. All of those things are necessary to an estimate of remaining life of a particular piece of pipe.

Q. Don't you take samples and then assume that that sample is typical of the environment of pipe within a given area? Do you understand?

A. I have done some sampling analysis, but not for [297] that purpose.

Q. You said to ascribe a remaining life, you would have to know all the conditions of its environment. Now, you have a certain number of feet of pipe that has been in the soil in Alameda Bay region since 1890. You ascribe——

A. I said, if my recollection serves me right, I think we had some piping there from the '90s, yes.

Q. So you ascribed a remaining life value to that?

A. Not to that particular pipe. We take it as a whole. We develop the average age of all pipe, and then by reference to this mortality curve, we derive a remaining life expectancy.

Q. But you do give some remaining life to this oldest pipe that is in your system?

A. That's right.

Q. You can't tell me what you gave in any given instance, can you?

A. I don't have the information here that would

(Testimony of J. F. Brennan.)

enable me to answer that question numerically. Of course, the determination of accrued depreciation and the life of pipe is usually done for the life of a given area and you hope that all of these statistical variations will average out. But if you come to a specific piece of pipe and ask that question, then I would say that what you should do is make an equation which sets up depth of pitting on the pipe as related [298] to pipe and soil corrosivity, and solve that problem for the wall thickness. That would give you the age value at which the pipe would fail.

Q. After you left the P. G. & E. in 1937, where did you go then?

A. I went with the Federal Power Commission.

Q. How long were you there?

A. I was there three years.

Q. Until about the time of the war?

A. About 1941.

Q. Were you working out here or in the East?

A. I was in California.

Q. Where was your headquarters?

A. The Federal Power Commission Regional Office in San Francisco.

Q. What were your duties there in your position, Mr. Brennan?

A. Could I have the question again?

Q. What was your job working for the Power Commission?

A. My title was Engineer Expert. That was my payroll title. I was assigned to the job of making

(Testimony of J. F. Brennan.)

studies of hydroelectric projects, making engineering reports on feasibility of the project, the efficiency with which it used water, and the reasonableness of the estimated cost or the actual cost, if it was built. [299]

Q. Maybe we can cut that short. That job did not embrace studying of any existing underground cast iron pipe, did it? A. No, sir.

Q. After that did you go with the P. G. & E. again?

A. I returned to the P. G. & E. Company.

Q. And you stayed there until the present with the exception of your war service, is that correct?

A. Yes. I was there from 1941. I was there just long enough to qualify for military leave, and so I had military leave from early 1942 until December, 1946.

Q. There is one note I made here that you at one time worked for the Railroad Commission.

A. That's right. That was in 1925.

Q. That was even before you went to the City of L. A.?

A. Yes, sir.

Q. What was your job with them?

A. My title was Assistant Engineer. I was given sheets of plans, sets of plans for 40 or 50 buildings, and instructed to take off the materials and to estimate the cost and to estimate depreciation.

Q. And did that have anything to do with the underground piping at all?

A. Only such as would be incorporated in the

(Testimony of J.F. Brennan.)

plumbing at various buildings. That would, of course, be cast iron. [300]

Q. Did you stay there until you went with the City of Los Angeles?

A. Yes. With an interim of about five months, I went with the Army Engineer Corps on Hydrographic Survey.

Q. During the war years were you on a technical position assignment?

A. Yes. For one year I was officer in charge of construction, Bureau of Ships Expansions, around the Bay area.

Then I was appointed technical officer in the office of the Inspector of Naval Material. I also had some sea duties in connection with that, testing, and so on, testing of materials at sea.

Q. I gather from that answer that that job had nothing to do with estimating the life of old cast iron pipe.

A. It had to do with the acceptance of a lot of materials, including pipe. I handled 25 to 50 test reports every day on informative materials, including pipe, specifications.

Q. That related to acquisition of new materials, including pipe? A. Yes.

Q. The job didn't relate to an investigation or study of underground existing pipe? That's all I want to know. A. That is correct.

Q. That takes us up to your return to civilian life, and [301] going back to your employment with the P. G. & E., where you have remained ever

(Testimony of J. F. Brennan.)

since as I understand. A. Yes, sir.

Q. What has been your title there at P. G. & E.?

A. Well, I am—let's see. My payroll title is Supervisory Evaluation Engineer.

Q. Supervisory of Evaluation Engineers?

A. Yes.

Q. Will you tell us what your duties have embraced during that 12 years span?

A. Yes. My duties have embraced very largely studies of depreciation. I am in a position now where operating departments refer to me problems for a determination of the choice of alternate plans, and this requires that I make estimates of life of the facilities, and the expected life of the whole facilities and the cost of new versus the cost of the old, so that the management can determine what to do about the problem. I have made hundreds of mortality studies and inspections of plants in the field, including inspections of pipe, underground structures of all kinds. I have a man skilled in the programming of these calculations for the high speed electronic machines, and we run our mortality analyses on those machines.

Q. Does P. G. & E. maintain any substantial amount of water pipe in its system, or is that completely foreign to [302] its business?

A. We have 10 water systems.

Q. How much would you say you have in the way of mileage mains, cast iron?

A. A considerable amount. In nearly every one of our water systems we have cast iron.

(Testimony of J. F. Brennan.)

Q. Where are those systems, Mr. Brennan?

A. They are generally in Northern and Central California, King City, Salinas, Sonora, and a few other small places.

Q. I suppose in those places you encounter corrosivity comparable to what you testified you encountered down here?

A. Only one instance that I have encountered corrosion similar to what I observed here at Berth 59. That was in a case of cast iron pipe, an 8-inch pipe on our Jackson system. It was near the tailings of an old mine. It was kept wet and it failed in about 20 years.

Q. On these other systems you have, including your gas system, where you use cast iron pipe, that is the only instance that you have of corrosivity that is comparable to what you found down here?

A. No. I thought you were referring to our water system.

Q. I did ask you about your water and now I am going to take the gas. [303]

A. We have had numerous instances, too many for me to recall, but I recall a recent one in 1956 over in San Rafael in the tide flats there. I think this was 10-inch cast iron bell and spigot type. It was a gas line. I investigated that failure. It was a graphitic corrosion failure. The soil test was about 3.4 on the Corfield scale. It was installed about 1939, as I recall, and beginning in 1952 we had trouble with it, and by 1956 we had replaced all of it. That was a line, I

(Testimony of J. F. Brennan.)

don't know the total footage of that, but it was fairly long, a thousand feet, something like that.

The Court: May I ask the witness a question?

Mr. Yoakum: Any time.

The Court: In all your experience in replacement of cast iron pipe, do you remember an instance where you replaced cast iron pipe solely on the ground of the passing of time and before there was any breakdown?

The Witness: This case in San Rafael was such a case, yes.

The Court: I thought you said there was a breakdown.

The Witness: There was a partial failure. I mis-spoke there. It did not completely fail.

The Court: I know, but there was at least a beginning of a failure, or a small failure.

The Witness: It was so badly corroded that upon [304] examination they decided it was too hazardous to keep it in service and therefore it was replaced. I think it was replaced before there was a leak.

Of course, when I say failure, your Honor, I would mean that the pipe doesn't necessarily have to be leaking at the time if the pressure in the pipe is such that it would blow through a very deep pit, see, blow through the iron that was left there, I would consider the pipe as having failed. In this San Rafael case the leak did not develop, but the line was replaced.

The Court: Then is it fair to say that the ordi-

(Testimony of J. F. Brennan.)

nary rule is that the pipe is not replaced because of the passing of time until at least there is a beginning of a failure, or something to indicate the pipe is failing?

The Witness: That is true of water systems, your Honor. It has been found that the most economical plan is to—in a water system where the pressure is low and the hazards are not particularly high, to accept the hazard of failure, to accept that risk of damage, because usually those failures are noted by wetting of the adjacent ground, and corrosion can get in there and do the work. However, that is not always true. We had some failures in Salinas, water pipe, cast iron main, and before it was discovered, it had washed out—well, it was discovered by the collapse of the street, so actually the paving collapsed, and one man's front [305] yard was washed out. We filled some fellow's cellar full of water, and we had to get pumps out there. We had an enormous damage bill there.

The Court: But do you know of an instance where you have ever recommended to any of your employees that because the pipe had been in the ground for 20, 30, or 40 years, it should be replaced before there was any indication of failure?

The Witness: In gas pipe, yes, sir.

The Court: In gas pipe, but not in water pipe.

The Witness: Not in water. We accept those hazards usually because it is more economical to pay the resulting damage than to go in. It is very costly these days to dig up pipe and replace it.

(Testimony of J. F. Brennan.)

Then, of course, you are gambling that the fully corroded pipe will continue to conduct water. It may be only a cylinder of carbon in the ground, sometimes just a hole in the ground, through which the back fill has become completely compacted and gas under low pressure, say under the pressure of 10 pounds, might easily be carried through this water, but the least little shock like an earthquake, settlement of the ground, subsidence, and all that, will ruin the pipe.

The Court: I am interested in your statement about payment of damage. Where your pipe breaks, you go in and pay damage as a matter of course?

The Witness: Where some contractor operates in [306] the vicinity, if he takes a piece of equipment and runs it carelessly through our main——

The Court: Well, that's a different story. We are not talking about that. If you have got a water pipe out here that has been used for a long period of time and the water pipe breaks and causes damage, do you go out and pay the damages as a matter of course?

The Witness: Oh, yes, without a question. If it is our pipe and our water.

Mr. Yoakum: Maybe the PUC ought to look into that.

The Court: I beg your pardon?

Mr. Yoakum: Maybe the PUC ought to look into that. Maybe they can lower their rates if they get a better legal department. I do not want to object to

the question, but I think it is way outside his bailiwick of jurisdiction.

The Court: I don't know whether it is way outside, because there is no question that the water escaped and it caused damage. Now, the only theory on which I have been operating is that the plaintiff is entitled to recover is because there was some negligence on the part of the defendant, but according to this witness there doesn't have to be any negligence. If it is their water that injures anything, they go out and pay the damages as a matter of course.

Mr. Verleger: Your Honor, I would like in [307] that connection to make the following statement. It seems to me clear from what the witness has said that it involves an economic decision. It may be cheaper to leave the water in there and take a chance——

Mr. Yoakum: ——I don't think that Mr. Verleger ought to——

Mr. Verleger: Please don't interrupt me.

Mr. Yoakum: I don't want you to make an argument while I am cross-examining.

The Court: Just a minute, Mr. Yoakum. We have a reporter here and he is just as good a reporter as the P. G. & E. or the Gas Company or the City of Los Angeles has in your department, but he can't take more than one of you at a time regardless. So do not interrupt. Allow Mr. Verleger to make his statement. We haven't got a jury here. If it is immaterial, I certainly will disregard it.

Mr. Yoakum: All right. I beg your pardon.

The Court: Well, I notice it's pretty near 11:00 o'clock and I have interrupted, so we will take the morning recess. We will now recess until 10 minutes after 11:00.

(Recess.)

Mr. Yoakum: With the permission of the court and through the courtesy of Mr. Verleger, we are going to ask Mr. Ashline back for just a moment. He seems to be embarrassed because he is comfortably dressed. I will say in [308] mitigation that he is going to leave on a trip.

The Court: Well, I won't look at him. You can proceed.

ROBERT R. ASHLINE

resumed the stand and testified further as follows:

Further Cross-Examination

By Mr. Yoakum:

Q. I will show you this document here that has been marked as L for identification and ask you if this is a part of your records down there, permanent records in your office down on Ducommun.

A. Yes, it is.

Q. This is an analysis of some water that was given to you by whom?

A. By Mr. McArthur of the Harbor Department.

Q. Did you have a man under you in the laboratory named Goldman?

A. Yes, sir.

Q. Did you instruct him to make an analysis?

A. I did.

(Testimony of Robert R. Ashline.)

Q. Did he give you that report?

A. He did.

Q. Will you just explain a little bit, without going into too much detail, just what that purports to say, that [309] document?

A. This is a sample of water submitted to me by Mr. McArthur, and their test sample was taken, labeled "From broken sprinkler main." That is all I had to start with. In the analysis of this water, it has a specific electrical conductance of 1407, which is equivalent to some of the water in the Los Angeles water system.

The sodium content was 243 parts per million, chlorides 224, sulfates 190. Those are all in parts per million.

Mr. Yoakum: I think that's all. Do you have any questions?

Mr. Verleger: Just two questions.

Redirect Examination

By Mr. Verleger:

Q. You say this sample is like some of the water in the L. A. water system. Particularly, is it like the Colorado River water? A. Yes.

Q. It has the characteristics of that water?

A. Yes.

Mr. Verleger: I have one other question while you are on the stand. Could I have this document marked for identification, please? [310]

The Clerk: Plaintiff's 29 for identification.

(Testimony of Robert R. Ashline.)

(The exhibit referred to was marked as Plaintiff's Exhibit No. 29 for identification.)

By Mr. Verleger:

Q. Referring now to Plaintiff's Exhibit 29 for identification, this is the progress report on studies of graphitic corrosion of cast iron that you referred to yesterday in your testimony, is it not?

A. Yes.

Q. That was a report made by you and Mr. Kirkendahl for the Department of Water & Power, City of Los Angeles, in 1941, was it not?

A. That's right.

Mr. Verleger: I would like, if I may, to offer this report in evidence at this time, if the court please.

Mr. Yoakum: To which we object on the ground it is immaterial, and that it is hearsay.

The Court: I think that this water content is immaterial. It doesn't make any difference at all, but you want it in, and so I have no objection. I will overrule the objection. This document may be received in evidence. I don't think it has anything to do with this case, but, however, if you want it in, you are making the record and I will let it in.

Mr. Verleger: Yes. Thank you, your [311] Honor.

The Clerk: Plaintiff's Exhibit 29 in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 29.)

(Testimony of Robert R. Ashline.)

The Court: I will do the same thing with your exhibits. If you want them in, I will allow them in, even though I think it has nothing to do with the case.

Mr. Yoakum: It may not, your Honor, but sometimes a lawyer is on the horns of a dilemma. You may have to put in more than is really necessary. That may turn out to be the situation. But out of an abundance of precaution, I think we ought to develop it. We are not offering it yet, because we haven't tied it up to the source of water.

Mr. Ashline, I think that is all we have of you.

Mr. Verleger: I am sorry, but I have just one other question.

Q. I take it it is true the Water Department is willing to do work on occasion when requested by the Harbor Department.

A. Will you repeat that?

Q. I judge from this test here that when the Harbor Department asks you to do something for them, you will do it, is that right?

A. We will do it for almost any consumer.

Mr. Verleger: Thank you.

The Witness: To a point. [312]

Mr. Yoakum: Now, is he excused?

Mr. Verleger: As far as I am concerned.

The Court: Yes.

Mr. Yoakum: You better run before they think of something else here.

(Witness excused.)

J. F. BRENNAN

resumed the stand and testified further as follows:

Mr. Yoakum: Your Honor was asking some questions at the recess of this witness. Had you completed?

The Court: Yes, I have concluded. But this raises a very interesting problem here. I have been assuming it would be necessary for me to find that the City or the Harbor Department, or whoever is responsible, was guilty of negligence.

Mr. Yoakum: I believe so.

The Court: Evidently from what this witness says, that is not the issue at all. If the City water escapes and causes damages, you pay off regardless of any fault. If that is the rule, then it isn't necessary for the plaintiff to establish negligence.

Mr. Yoakum: Well, of course, Mr. Brennan, without passing upon his qualifications as an engineering [313] economist, is not a very good lawyer, in my opinion. If you will read the case of Williams that is cited in one of my innumerable briefs in this case—it is a brief filed under date of October 3, 1958, if you will read the Williams case——

The Court: Give me the citation. I want to read it.

Mr. Yoakum: Williams against City of Long Beach, 42 Cal. (2d) 716. Mr. Verleger may distinguish it on the ground it is escaping gas.

The Court: 42 Cal. (2d) what?

Mr. Yoakum: 716. You will see that there is no liability in the absence of negligence on a substance

(Testimony of J. F. Brennan.)

escaping from a municipality or somebody else's pipe.

The Court: Let's assume we have, not a municipality here, but a private corporation, and the water escapes. Is the rule the same?

Mr. Yoakum: In the Williams case, it was a proprietary function being conducted by the defendant, so the rule would be the same. The only distinction I can see that Mr. Verleger can make is that it was gas that escaped instead of water.

The Court: Well, this witness may not be a good lawyer, but he at least tells us what P. G. & E. does, and P. G. & E. is a tough customer sometimes, I understand.

Mr. Yoakum: Well, I can't believe—— [314]

The Court: Well, leave this issue now. I want to read the case and see what happens.

Mr. Yoakum: There are many other cases that hold that a supplier of water whose pipe breaks is not an insurer. It is not a question of an absolute liability, like Rylands against Fletcher, or Green against General Petroleum, where you put an obnoxious or very dangerous substance on your property and it has escaped onto somebody else's property.

Mr. Verleger: I think it is worth noting that Rylands against Fletcher, which counsel is just citing, was a case in which water got away.

Mr. Yoakum: Rylands against Fletcher was not a municipal water line case.

Mr. Verleger: It is a case where water got away!

(Testimony of J. F. Brennan.)

Mr. Yoakum: I don't care to argue with counsel.

The Court: I will read the case.

Mr. Yoakum: You will find that there is no doubt about the absolute requirement to prove negligence.

Cross-Examination

(Continued)

By Mr. Yoakum:

Q. Mr. Brennan, during the court's questioning of you, I thought that you said that if you thought the pipe was weak, you would dig it up and check it. Did I get you correctly? [315]

The Court: He didn't say if he thought. It is not a question of thinking.

Mr. Yoakum: I am not sure I got it correctly. That is the purpose of this question.

Q. You said something about you would dig the pipe up and check it.

A. If in our water system—you are speaking of our water system?

Q. Yes.

A. If in our water system evidence of leakage appears in the street or an owner's property and there is a sufficient quantity there, there is a likelihood that it does come from a—there is a practical certainty that it does come from our pipe, then they dig it up and make a repair.

Q. You don't intend to say that in case water pipes, it has been your experience that they dig them up to look at them in advance of trouble, do you?

A. Generally not.

(Testimony of J. F. Brennan.)

Q. Do you have any instance where they have done that? A. No, sir.

Q. In your position with the P. G. & E. since the war years, have you been used for rate purposes?

A. You mean as a witness?

Q. Yes. A. Yes. [316]

Q. Did you make in connection with those objectives—I suppose you made depreciation studies?

A. Yes, sir.

Q. Is it fair to say that ordinarily a utility when appearing before a rate making body tries to get as large a depreciation as possible?

A. I don't think that would be a fair statement, no.

Q. Would you say that the utilities try ordinarily to have a very small depreciation for the purpose of rate fixing? A. No, sir.

Q. From your experience, what do they try to do with this depreciation when they appear before the PUC or other rate fixing bodies?

A. They attempt equitably to spread the cost of depreciation over the life of the facilities.

Q. Has it been your experience that the utility depreciation testimony has usually been at variance, frequently it varies with that of the PUC staff?

Mr. Verleger: That is objected to as immaterial, if the court please.

The Court: Overruled. Read the question.

(Question read.)

The Witness: There has been controversy, [317]
yes.

(Testimony of J. F. Brennan.)

Q. (By Mr. Yoakum): Many times you don't see eye to eye, isn't that true? A. Correct.

Q. And usually the staff of the PUC is contending for a longer life to the asset than the applicant is, isn't that right?

Mr. Verleger: That is objected to as immaterial, if the court please.

The Court: Overruled.

The Witness: There is a tendency on the part of the staff to keep depreciation accruals at a minimum. However, the staff of the Commission has recently espoused a doctrine of depreciation under which the accruals would be substantially greater than what we would be willing to accept.

Q. (By Mr. Yoakum): Isn't it fair to say that in your efforts in connection with rate fixing activities, you have tried to establish a quick write-off so that you could show a larger operating cost for the purpose of sustaining an application for a rate increase? Isn't that fair to say? A. No, sir.

Q. You haven't tried to do that?

A. No, sir, I haven't. [318]

Q. Well, haven't you tried to establish quick write-offs?

A. No, sir. We have done this. We have taken advantage of the 1954 Revenue Act to accelerate depreciation.

Q. I don't mean that, anything that the law gives you expressly in the way of a quick write-off. I just wanted to find out if you weren't trying usually to get a faster write-off than the Commission would allow? A. No, sir.

(Testimony of J. F. Brennan.)

Q. Then what do you mean when you say frequently you are not eye to eye with the staff on depreciation?

A. The staff engineers are, I suppose, commendably zealous in the performance of their function. They like to see our operating costs low. Usually, they have no basic information such as we have. We have volumes and tons of material that have been processed through electronic machines. They can check the basic data, determine the accuracy of our calculations, and once that is done, the conclusion is inevitable that a certain rate for a certain life of a plant, a certain salvage value, a certain subsequent consequent rate of depreciation should be the proper one.

When I say the staff espoused another plan, we advocated a sinking fund plan, 5 per cent. They wanted us to go to a straight line depreciation on the remaining life basis, which would substantially increase our annuities. [319]

Q. It is true, is it not, frequently after you have had a long period of use and you have written a piece of pipe down, just for example, where it has a life expectancy of 20 per cent left, the Commission will review that situation and assign a remaining life longer than that and compel you to take depreciation on that kind of basis, won't they?

A. Yes, but when they determine remaining life, they do it from our analysis. They are the only ones they have.

Q. That may be.

(Testimony of J. F. Brennan.)

A. There may be differences in——

Q. Do you know of any instance where any rate making body has permitted a utility to claim a life of 25 years for water pipe?

Mr. Verleger: That again is immaterial, if the court please.

The Court: Overruled. This is an expert witness and this is cross-examination.

The Witness: Not specifically cast iron pipe. There have been properties in my experience that I have known something about, in which the average life of underground pipe was taken as something like 25 to 30 years, but that may have included bare steel pipe, cast iron, and others.

Q. (By Mr. Yoakum): You don't as far as cast iron is concerned? [320]

A. Not specifically, no, sir.

The Court: May I ask a question? In rate making procedures, would the company be allowed in trying to establish the rate to show that a certain length of pipe of a certain pipe length has been in the ground for 30 years, consequently it is valueless and should be replaced, and charge up the cost of replacing the pipe without showing that the pipe had deteriorated?

The Witness: No, sir.

The Court: Just because of passing of time you couldn't charge off the pipe as valueless, could you?

The Witness: No, sir. The system that we use now is a method under which the cost of pipe is reduced by the magnitude of the depreciation and

(Testimony of J. F. Brennan.)

reserve, and only balance then is accrued in the reserve over the remaining life of the property. The object there is to assure, of course, that no more than the cost is ever charged to the customer.

The Court: Let's assume now, this is for the purpose of an assumption——

The Witness: Yes, sir.

The Court: ——that this pipe down here we are talking about in the Harbor has had a failure, the pipe has been in the ground for 40 years. Now, if it was a private corporation and the corporation was trying to establish certain values for the purpose of fixing rates, would it be possible [321] to contend that the pipeline was valueless and it would have to be replaced solely because of the passing of 40 years and solely because there has been one break?

The Witness: It is possible, yes, sir. That would come about this way. Of course, rate fixing is prospective. We are always dealing in estimates of the future. Now, in a rate case, we show in exhibits the amount of expenditures that we propose to make in the following year for construction, and those expenditures include all of the replacements that the company plans to make.

So that the answer to your question will be yes, if that failure, if that replacement were indicated, that would be in the construction budget. It would go into an exhibit and be presented to the Commission, and we would say, "This is what we are

(Testimony of J. F. Brennan.)

going to do in construction work next year, so that our investment will be correspondingly increased.”

Of course, when the older pipe is taken out, the book cost would be reduced by the cost of that pipe, so that actually the only increment in value of the plant would be the difference between the cost of installing the new and the book cost of the old.

Q. (By Mr. Yoakum): Are you telling the court that if you had a length of pipe, a mile of pipe that was giving the City service, except you had one break in it, that if you told the [322] Commission, “We are going to replace this old pipe because we had one break,” that that expenditure would be permitted?

The Court: You have overlooked one very important part, that is, the pipe was in for 40 years.

Q. (By Mr. Yoakum): And that it had been in use for 40 years?

A. Undoubtedly we would find no objection on the part of the Commission’s engineers.

Q. Do you know of any instance where you ever did that?

A. Well, I pointed out in reply to Judge Westover’s question about this San Rafael incident, I pointed out that that replacement was made prior to any complete failure of the pipe.

Q. That pipe had been in just a short time and had developed several leaks, you had numerous troubles with it, isn’t that right, sir?

A. We had some trouble. I would have to go back to the reports to determine the sequence of

(Testimony of J. F. Brennan.)

events, but here is what happened. It was installed in 1939. It was in a soil that was designated as bad soil, having a Corfield index of over 3. I don't know what first drew their attention, the operating department's attention to it, but they started replacing it in 1952, thinking that they could replace a few lengths of pipe and that the remainder would stand up. But [323] by 1956 they discovered that corrosion had progressed to an extent that it would be economical to replace the entire line.

Q. How did they discover it? Because of additional trouble between 1952 and 1956?

A. Well, when our foremen open up a line, they have a form on which they report the conditions that they observe, and we have laboratory men who go out and take samples of this soil, or measure the resistivity, observe those conditions, and come to a decision as to whether only that piece of pipe should be replaced, or whether we should go down the street another thousand feet. They look at the records, find the dates, find the age of the pipe, and here again it is a matter of probability. You have one puncture, say, in one particular location. It is a matter of spending all that money to take up a thousand feet. It depends upon the probability estimated that this line is severely corroded.

Q. Do you know of your own knowledge that there was just the one leak and then they removed a thousand feet?

A. That has happened in San Francisco. We

(Testimony of J. F. Brennan.)

had a lot of trouble with cast iron there. We have a program of leak-clamping the joints, as they call it, because of the recurring leaks. So in order to try to salvage the investment, it was decided to put leak clamps—a leak clamp is two circuits or pieces of metal that fit over the outside of the pipe. One of them will come up alongside the bell and would be secured [324] there by the bell, and the other side would be a clamp in which the bolts would be cinched up to compress the packing in the joint to prevent leaks.

Of course, every little earthquake disturbance you have causes leaks. We had trouble with this last quake.

Q. Are you talking about joint leaks now?

A. Yes. When those joints, when a street is excavated and those joints are exposed, technicians take soil samples, they tap the joint, they investigate the condition of the pipe, and come to some conclusions as to whether they should go ahead with this leak clamping program, because it is expensive, or whether it would be better to replace the pipe with Transite pipe or steel pipe.

Q. Mr. Brennan, that doesn't have any reference to this graphitic corrosion problem, does it? That relates to the problem of whether they are going to put in a different type of pipe because they have so many leaks at the joints, isn't that what you are telling us now?

A. I didn't understand your question was pointed directly to graphitic corrosion.

(Testimony of J. F. Brennan.)

Q. I want to know an instance of when, without any trouble, you have replaced pipe because of age.

A. We frequently move pipe or replace pipe when it becomes evident that considerable damage may ensue if the pipe is left there. I will give you an instance. Only recently, [325] we had a high pressure gas transmission line on what we considered country property. The town grew up, people moved into that area, and we judged it to be hazardous to keep that high pressure line there, so we dug it up, bought a right-of-way a couple of hundred feet away, and moved the entire line.

Q. That was gas. You didn't do that with water?

A. No, sir.

Mr. Verleger: Your Honor, I want to object to the hypothesis that counsel repeatedly urges if it is intended to correspond to the facts here, that there has been no trouble. I respectfully call attention of the court to the fact that the answers to the interrogatories here show two leaks from this system on adjacent buildings or in the same building, depending on which set of answers you accept as being true. Further, the records of the City show an average unaccounted for flow of water through this system of 100 cubic feet a day, and show the repair of additional leaks.

They also indicate, the answers to the interrogatories do, that leaks at the joints, much like the leaks the witness is referring to, have been shown, so we are not presented in this case with a pipe that was free from trouble or anything like it.

(Testimony of J. F. Brennan.)

Mr. Yoakum: Even though we don't have a jury, I [326] wish counsel would refrain from making these arguments. These arguments are proper in closing, but so far——

The Court: Suppose you go ahead with your questions. There is no need to prolong this any longer.

By Mr. Yoakum:

Q. Getting on to a little different subject, Mr. Brennan, from what shed did you take this earth you testified to taking down at the Harbor?

A. Berth 59.

Q. Was that from some place inside of the berth? A. Yes, sir.

Q. Was there a hole in the floor of the shed?

A. Yes, sir.

Q. How big a hole was it?

A. I didn't measure it, but if my memory serves me right, one hole was approximately eight feet by perhaps six, where the concrete had collapsed, the concrete deck had collapsed.

Q. How deep was it?

A. The fill had been washed from under the floor to a depth of a couple of feet. It varied, of course.

Q. You say—I didn't get the last part of that.

The Court: Read the answer.

(Answer read.) [327]

Q. (By Mr. Yoakum): But roughly about two feet below the floor?

(Testimony of J. F. Brennan.)

A. Two or three feet, perhaps more in places. I didn't measure that.

Q. Well, how deep was it—did you go down and get this earth yourself?

A. I was in the hole and one of the men there, I asked him to dig down as deep as he could and get the sample. He did that.

Q. How deep was it from the top of the floor to where you took out this earth?

A. I would estimate about four feet.

Q. Where inside of the shed would you place this hole? A. Near Door 17.

Q. Do you know the width of that shed?

A. No, not exactly.

Q. Assuming it was 100 feet, how far away would it be from Door 17, this hole?

A. May I refer to my notes on that?

Q. Certainly. Do you mind if I look at them while you refer to them.

The Court: Counsel, you are not going to contend this is not hot soil, are you?

Mr. Yoakum: I am going to argue that this evidence doesn't show that this soil was even there at the time the [328] incident happened.

The Court: But the map has been introduced where this area was indicated as hot.

Mr. Yoakum: That is the plaintiff's term. We didn't use it. We didn't use it. They talk about degrees of corrosivity.

The Court: Are you going to contend it was not a hot area?

(Testimony of J. F. Brennan.)

Mr. Yoakum: I am going to contend that they haven't proved that in this particular place where this pipe was, that it was.

The Court: Are you going to have any witnesses who will come in and tell me this is not a hot area?

Mr. Yoakum: I am going to have witnesses explain the physical conditions that existed underneath that loading dock there or in that general area, to try to explain what the situation as to whether this activity was going on.

The Court: Of course, you know the break didn't occur underneath the building. It occurred out on the platform, underneath the platform.

Mr. Yoakum: Well, that is some distance.

The Court: I suppose it is maybe 50 or 60 feet from where this earth was taken.

Mr. Yoakum: That's right. That is what I want to find out, how far it was. [329]

Q. Can you tell now, Mr. Brennan?

A. Yes, at Berth 59, Door 17, spot 73. That is just inside door, spot 73, my notes say.

Q. Would that mean to you that the minute you got inside the door just a matter of one or two steps, this hole was present?

A. Yes, one or two steps.

Q. I mean a matter of five or six feet you are talking about where this hole was from which the sample was taken?

A. Yes, I think that is a fair estimate.

Q. Did you personally make these Corfield tests?

(Testimony of J. F. Brennan.)

A. I started them. Of course, the Corfield test takes 24 hours to complete.

Q. I know I over simplify it, but I want to see if I understand what happens. You stick a metal rod into a specimen——

A. No, a small piece of pipe. Let me show you (indicating).

Q. What is this, a piece of gas pipe?

A. It is a piece of wrought steel pipe, $\frac{3}{4}$ -inch.

Q. This is not cast iron pipe? A. No, sir.

Q. Why do you use a different type of material in making this test from the type of material that is involved here? [330]

A. Because this is a standardized test. In order to compare measurements, you use the same, exactly the same conditions for each test, including the same type of metal.

Q. You put this hollow pipe, wrought steel——

A. Wrought steel.

Q. ——into this sample, and you attach two currents to it?

A. You attach two wires, one wire to the pipe, and the other one to the can.

Q. Then you don't get these readings until 24 hours later, approximately, is that it?

A. That's right, exactly, and as precisely as the clock will measure it. I want to be careful about using that word precision after what I said about it.

Q. Yes. Were there two samples that you made readings on?

(Testimony of J. F. Brennan.)

A. Three samples from inside the Berth 59.

Q. Would you turn to that record of your notes down there at the Berth? You say here, "Two samples of soil taken from the Berth."

A. Yes.

Q. Did you split that up to make three tests?

A. No, sir. I took another sample. I took three samples in all. This just specifies two, but I took three.

Q. Do you have the results here of those tests, those three [331] samples? A. Yes.

Q. Would you turn to them?

A. (Complying): There is test No. 1.

Q. On test No. 1, what is your rating there?

A. 8.1 grams.

Q. 8.1. Then on test No. 2, you got a rating of 1.9, is that correct?

A. This sample, I invite your attention to this note, this sample contains less than one-half of the quantity. This sample was given to me. I didn't take it. It was less than one-half of the quantity of soil required by the regular test. "Test to be run"—I am reading from my test report—"Test to be run, but results will not be used unless satisfactory way can be found to calculate the probable index in terms of a full can."

Q. Let me reconstruct it, then. Two days after this incident occurred, the attorneys for the plaintiff sent you a sample, didn't they, and you made a test on it on March 14, 1956?

A. Yes, that is when that sample was taken.

(Testimony of J. F. Brennan.)

Q. And you got a very low Corfield rating, didn't you?

A. This is completely invalid. There wasn't sufficient quantity for the test, but I ran it [332] anyway.

Q. You made the test, didn't you?

A. Yes.

Q. And you got this low rating. Now, then, did you advise Mr. Verleger or his office of this low rating?

A. I told him that the sample could not be used.

Q. You told him in effect the rating was so low you couldn't make anything of the sample, didn't you?

A. Yes, I told him the sample was no good and couldn't be used.

Q. You told him that it couldn't be used to——

The Court: Counsel, you are arguing with the Witness. You are trying to get the witness to say something he hasn't said. He has told you two or three times the sample was so small he couldn't use it.

Q. (By Mr. Yoakum:) Why did you make the test on this insufficient sample then?

A. I was curious about it. I thought perhaps I could find in the literature some way by which I could translate this low rating to what would be expected had the can been full, had there been an adequate quantity. But I found no way of doing that that would be acceptable.

Q. Your notes indicate that this sample that

(Testimony of J. F. Brennan.)

you say is unsatisfactory, that was taken from the very area where the pipe gave way, wasn't it? [333]

A. Yes, sir.

Q. Now, then, as a result of this, you came down to Los Angeles, as I understand it? A. Yes.

Q. And then you also have your test No. 3, in which you got a rating of 2.0 on your Corfield factor.

A. This is the soil, you notice here, this is alongside Berth 59, Sample No. 3, from a street excavation outside Berth 59, City of Los Angeles, at pipe depth approximately four feet below the street level opposite Door No. 5 of Berth 59. Sample black. No evidence of seashell fragments.

Seashell fragments had appeared in the soil I sampled inside the pier.

Q. Is this in your handwriting in pencil?

A. Yes. That is all in my handwriting there.

Q. Was there another sample here?

A. Yes, sir. Here is one.

Q. So sample No. 3 was taken out in the street, and I suppose that is a low factor, 2.8?

A. Yes, sir, but that needed correction for voltage. You see, the voltage during the test was not held constant. This test requires the 6-volt DC potential be constant or that the results be translated to an equivalent 6-volt potential. Although I have 2.8, when I converted that to 6-volt basis, it is 2.4. I did that to the other tests, of course.

Q. Actually, it is a little lower? [334]

A. Yes.

(Testimony of J. F. Brennan.)

Q. 2.4? A. Yes.

Q. That is from the street excavation outside of Berth 59? A. Yes.

Q. Then here is test No. 4. Is that taken from the hole inside the shed? A. Yes, sir.

Q. And that showed——

A. This was taken 10 feet——

Q. It looks like 10.6.

A. ——10.6 feet from the place where the first sample was taken.

Q. But all in the same hole?

A. Yes. This is the first one here inside the hole.

Q. Inside the shed, you only went into one hole, didn't you? A. No, I went into two holes.

Q. And that gave us 6.5. Now sample No. 5, was that taken in the hole inside the shed?

A. Yes, sir.

Q. And that gave us 7.5? A. 7.5.

Q. That is the end of it? [335]

A. That's all, yes, sir.

Q. Now, then, which ones did you use in arriving at this average that you gave us? Let's refer to them by number. No. 1 is 8.1?

A. Yes. No. 4 is 6.5. No. 5 is 7.5.

Q. How did you then come up with a 6.5 average? That was your testimony yesterday.

A. This would average higher than 6.5.

Q. Yes, that is obvious.

A. The voltage, however, the average voltage was over six volts, so I had to reduce those indices to

(Testimony of J. F. Brennan.)

an equivalent at six volts. When I did that, the average turned out to be 6.5.

Q. You only show this adjustment for voltage on this test No. 3?

A. I did it on another sheet of paper. I transcribed the results..

Mr. Yoakum: I think we ought to have these sheets in evidence, your Honor. Maybe you can make copies of them at the recess, Mr. Verleger.

Mr. Verleger: I have no objection to the sheets going in evidence unless Mr. Brennan has.

Mr. Yoakum: He may want to keep them.

Mr. Verleger: Do you have any reason, Mr. Brennan, why you need to keep those particular sheets? [336]

The Witness: If I had a photostat, it would be all right.

The Court: They may be received in evidence. At the end of the trial, they can be returned to the witness.

Mr. Verleger: All right.

The Witness: May I ask, counsel, you want only the tests I used in coming to my conclusion as to the 6.5?

Mr. Yoakum: No, sir. I want all five tests. You made five tests.

The Witness: Very well.

Mr. Verleger: Do you want to take them out of the book, Mr. Brennan?

The Witness: Certainly.

The Clerk: Exhibit M in evidence.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit M.)

The Court: Now, counsel, it's 12:00 o'clock. You have probably completed this line of questions about these tests.

Mr. Yoakum: I have a few more on the tests. I am perfectly willing to adjourn at this time.

Mr. Verleger: Your Honor, I have a couple of questions. The witness had tentatively planned to catch an airplane at 3:00 o'clock today. I wonder how much longer does counsel expect to be. [337]

Mr. Yoakum: I would say—I have great difficulty in estimating—but I would say a half hour easily. That is on the conservative side.

Mr. Verleger: Then I think we'd better make our arrangements accordingly.

The Court: Court will stand in recess until 2:00 o'clock this afternoon.

(Thereupon, an adjournment was taken to 2:00 o'clock p.m.) [338]

Thursday, October 9, 1958—2:00 P.M.

The Court: All right, you can go ahead.

J. F. BRENNAN

resumed the stand and testified further as follows:

Cross-Examination (Continued)

By Mr. Yoakum:

Q. Mr. Brennan, having in mind that you testified that your Corfield samples showed an average—was it 5.6? A. 6.5.

(Testimony of J. F. Brennan.)

Q. 6.5 for those three samples taken inside, from dirt inside the shed, would you have the court understand that a sample taken right at the point where the pipe burst would necessarily be close to that figure?

A. I think that is a fair assumption, yes, sir.

Q. The explanation of why the one that was taken right at the point of the break was so low is because there was a small amount of earth, is that correct, and you have 1.9?

A. It wasn't sufficient to give an adequate test.

The Court: You know, it seems to me the witness has said that a half dozen times. I got it the first time.

Q. (By Mr. Yoakum): With reference to the sample that you took out in the street and got a 2.8 reading, why would you say that [339] would be less indicative of the condition underneath the loading dock where the pipe burst than the 6.5 reading that you took from inside the shed?

A. It is farther away. It was a different type of soil. It had no seashell fragments in it, as do the others, indicating possibly the presence of chloride.

Q. How much farther away was it?

A. I think you can ascertain that by comparing the location which I cite on the test sheet with the drawing, which is an exhibit on the board here.

Q. I want to clear up your testimony with reference to the pipe that you examined down at the yard. Remember you went down to the yard that day?

A. Yes, sir.

(Testimony of J. F. Brennan.)

Q. You identify the pipe that you examined as being these pieces now before you?

A. You say can I identify them?

Q. Yes. A. No, sir.

Q. Did they have those writings on them, the paint numbers?

A. I don't recognize that, no. My notes show the number that appeared at the yard was written in a crayon. That apparently is paint.

Q. Is it your testimony then that you do not think that [340] the pipe that is here as an exhibit before you is the same pipe as that which you examined?

The Court: He didn't say that, now. He said he couldn't identify it. He didn't say he didn't think it was the same.

Mr. Yoakum: I am trying to get him to say what he does think about it. I don't know what his testimony is.

The Court: He says he can't identify that pipe.

Q. (By Mr. Yoakum): Would you say that that was the pipe or was not?

A. I don't know.

Q. Did you say that you could tell by looking at the pipe that you saw that it was corroded?

A. Yes, to this extent. Simply by looking at it, I saw a red color, the color of red rust, and I knew at least there was a surface film of red rust on it. I could not tell anything about the graphitization.

Q. You couldn't tell from the surface whether there was graphitization, by looking at the surface?

(Testimony of J. F. Brennan.)

A. I could not.

Q. I suppose pipe that sets out at the seashore area will acquire a red rust, will it?

A. If it is out in the air with a sufficient supply of oxygen, yes.

Q. Did that red rust you saw on the pipe in your opinion [341] have anything at all to do with its giving way?

A. No. I think the rust that I saw was rust that developed on the pipe between the date it was taken out of the location where it failed and the date I saw it.

Q. Did you make any tests on the pipe that you looked at in the yard? A. Yes.

Q. What did you do?

A. I took a hammer and chisel and chiseled various points in the pipe.

Q. You found graphitization? A. Yes.

Q. Did you find any sections that were good?

A. Yes, sir, good to the extent that they were not completely graphitized. One or two spots were coated with a coating of red rust, and under the red rust was found metal.

Q. You were describing this little process that is set up when graphitization starts to working. You mentioned two terms, I think, anode and cathode. A. Yes, sir.

Q. One is positive, is it? A. Yes.

Q. And the other is negative? A. Yes.

Q. Which is which? [342]

A. The anode is the negative.

(Testimony of J. F. Brennan.)

Q. And the cathode is the positive?

A. Yes.

Q. I probably misunderstood you, but I have a note here you said the pipe you looked at showed surface graphitization.

A. In parts it did.

Q. What does that mean, surface graphitization, what does that mean?

A. That means that it was graphitized from the outer surface.

Q. You don't mean that you can see that by looking at the outside of the pipe?

A. No. I said I tested it with a hammer and chisel.

Q. What was your testimony with reference to this 25-year life that you testified to yesterday? I asked you earlier this morning if you had said that after 25 years the pipe should be taken out and discarded, and I think you said this morning no, that that was not your testimony.

A. No, that was not my testimony.

Q. I want to get it clear, please. What is the testimony about this 25-year situation?

A. I said that under the conditions that existed here at Berth 59, Pier 1, it was my opinion that the expectancy from the time of installation to complete graphitization in places, the spots on this pipe, would be 25 years. [343]

Q. Is there any difference in the life of pipe, cast iron pipe, that is in a similar environment, dependent upon the inside diameter of that pipe; for

(Testimony of J. F. Brennan.)

example, will a 10-inch pipe have a longer life than a 4-inch pipe?

A. No, sir, because the thickness of the wall of a 40-inch pipe is less than a 10-inch pipe, and it would take longer for it to graphitize to completion. However, I don't wish to say no to the first question of yours.

Q. I guess I stated two questions. In a given environment, in an identical environment, would a 4-inch cast iron pipe graphitize sooner than a 12-inch pipe?

A. Under the supposition of a corrosive environment, such as this, graphitization process would begin and proceed roughly at the same rate for both pipes, but since the 4-inch pipe has a lower wall thickness, a thinner wall, one would expect it would be completely graphitized before the 10-inch pipe.

Q. So you might expect the larger pipe to last longer before it would give out?

A. That is correct. Now, there is implied in your question something that goes to the theoretical considerations of the development of corrosion, namely, that there is again another and a different statistical relationship here. If you examine a piece of pipe and find that it is pitted, corroded, either graphitized or corroded, steel pipe, you may [344] measure four or five different places where it is corroded and find that the corrosion is 50 mils, 50/1000 of an inch, for example, as the average.

Now, if you examine a greater length of pipe, it is likely that you will find a deeper pit. In other words,

(Testimony of J. F. Brennan.)

there is a statistical relationship between the area that you examine and the depth of the deepest pit. If you want to go far enough, according to the relations established by technicians who investigated this subject, there is an area relationship there. I don't want my answer to imply that I think that the size makes no difference. The size of the area examined, of course, could be related both to the diameter and the length that you look at.

Q. Do you know whether the Internal Revenue Service of the Federal Government has depreciation figures on cast iron pipe?

A. They publish a Bulletin F, which is published for the information of taxpayers who have no other information of their own.

Q. The government will accept the bulletin, won't it, for depreciation?

A. The government may accept it, but many taxpayers won't.

Q. They think it should be longer, is that right?

The Court: How about the engineers? The taxpayer [345] may not accept it, but how about the engineers?

The Witness: Your Honor, this Bulletin F was prepared to assist taxpayers——

Mr. Verleger: Your Honor, I have to object to the witness volunteering.

The Court: Well, I asked the witness the question.

Mr. Verleger: I am sorry. I didn't realize that, your Honor.

(Testimony of J. F. Brennan.)

Mr. Yoakum: Will you mark this for identification?

The Clerk: Defendants' Exhibit N for identification.

(Exhibit was marked Defendants' Exhibit N for identification.)

Q. (By Mr. Yoakum): I refer you to an excerpt from Bulletin F and ask you to identify that as being the one with reference to water transmission systems.

Mr. Verleger: I am going to object.

The Court: There is no question. You can't object until there is a question.

Mr. Verleger: True enough, your Honor. I was anticipating something.

The Witness: Yes.

Mr. Verleger: I thought there wasn't a question,

Mr. Yoakum: There was a question.

The Court: There is a question then. [346]

Mr. Verleger: I would object to the witness identifying a portion of the Internal Revenue Code.

The Court: Overruled.

Q. (By Mr. Yoakum): That is with reference to water, isn't it?

A. Pardon me. I want to get the pending question. Would you read it, Mr. Reporter.

(Question read.)

The Witness: This is entitled "Bulletin F, Water Supply."

Q. (By Mr. Yoakum): Yes, and then what does

(Testimony of J. F. Brennan.)

it say after life of typical plant? It says the average use or life in years, and it talks about——

Mr. Verleger: Is this an argument of counsel or a question?

Mr. Yoakum: This is a question. Why don't you let me finish my question?

Q. You see, here it says cast iron water mains in different sizes. A. It says mains, cast iron.

Q. And the different sizes? A. Yes, sir.

Q. Do you or do you not identify this as a Bulletin F of the Internal Revenue Service relating to water supply [347] systems?

A. I can only identify it by what markings are on it. It says Bulletin F. If you say it is from the Internal Revenue Service, I suppose we can accept that.

Mr. Yoakum: We think, your Honor, this is a matter that you can take judicial notice of, just like a report in a law book, but for convenience we took out a Bulletin F page relating to water line depreciation.

The Court: Do you want it admitted in evidence?

Mr. Yoakum: Yes, we offer it.

Mr. Verleger: I am going to have to object, your Honor, on the ground that it is immaterial, irrelevant and incompetent, and on the further ground that the figure for the life of a 6-inch water pipe under any and all conditions would hardly be material for the life of one in a highly corrosive environment, which is the testimony that we have here.

The Court: Overruled. It may be admitted.

(Testimony of J. F. Brennan.)

The Clerk: Exhibit N in evidence.

(The document heretofore marked Defendants' Exhibit N was received in evidence.)

Q. (By Mr. Yoakum): Are you familiar with an organization known as the Cast Iron Pipe Research Association?

A. I know of the existence of that organization.

Q. Do you know what its function is? [348]

A. I presume to promote and develop research in cast iron uses and technology.

Q. I want to show you a——

Mr. Verleger: Pardon me, counsel. Can I see it first?

Mr. Yoakum: Pardon me. Certainly.

(Handing document to Mr. Verleger.)

Mr. Verleger: Is this an advertisement in News-week here?

Mr. Yoakum: This is U. S. News & World Report.

Mr. Verleger: Your Honor, I would object——

The Court: Just a minute. I can't possibly rule upon an objection unless I know what the question is going to be.

Mr. Verleger: I am sorry, your Honor.

Q. (By Mr. Yoakum): This ad here of the Cast Iron Research Association talks about the age of water and gas mains throughout America, cast iron water and gas mains, 100 and more years old are still serving. Do you agree that is a correct statement of the situation? A. I don't know.

(Testimony of J. F. Brennan.)

Q. You don't know about that. You haven't in your studies studied their research?

Mr. Verleger: I am not sure what counsel's statement was referring to when he said was something a correct [349] statement. Of what situation.

Mr. Yoakum: He understood it. He answered.

Mr. Verleger: Is your question, is there cast iron pipe somewhere which has lasted 150 years, or what?

The Court: Just don't argue between yourselves. If you have an objection, make the objection. If you don't have an objection, don't argue about it.

Is there a pending question?

Mr. Yoakum: I think so, and I have forgotten it.

The Court: Maybe you better start all over again. May I ask a question of the witness since we have interrupted?

Mr. Yoakum: Certainly.

The Court: Do you know of any cast iron pipe which has been in service for 100 years or more?

The Witness: They say the cast iron pipe in the fountains of Versailles in France are much older than that.

Q. (By Mr. Yoakum): Did you make any study in connection with your work on this case of any other corrosion failures in the harbor area?

A. I have some knowledge of corrosive—

The Court: Just a minute. If I understood the question correctly, it was in connection with this case?

Mr. Yoakum: Yes. [350]

(Testimony of J. F. Brennan.)

The Court: In connection with this case, did you make any other study?

The Witness: No, sir.

Q. (By Mr. Yoakum): Are you at all familiar, Mr. Brennan, with the history of the 10-inch water line that starts here at the short end of Pier 1, that is the pier where you took your samples, and runs generally in a northwesterly direction up Signal Street for some five thousand feet? Are you familiar with that pipe in any way?

A. Only from what I have heard here in the court room.

Q. Assume that that pipe was installed in 1914, and that there had been no corrosion failure in that pipe up to 1956, how do you explain that situation and reconcile it with your testimony that this pipe here in question should be considered unsafe after 25 years?

The Court: Counsel, I don't believe the witness said that.

Mr. Yoakum: All right, your Honor.

The Court: The witness said ordinarily, as an average. He didn't say this particular pipe. He says ordinarily. He didn't say this particular pipe should have been replaced in 25 years.

Q. (By Mr. Yoakum): Was your testimony about the 25-year period intended [351] to cover this subject pipe?

A. I stated, I thought, under these conditions that the expectancy, the average life, that is, that a pipe is installed new, and the average life of a cast

(Testimony of J. F. Brennan.)

iron 8-inch main installed in a very highly corrosive environment, such as this was, would in my opinion be 25 years.

Q. Then I think it is fair to say the answer was intended to refer to this particular pipe. I want you to then explain how you reconcile your appraisal of 25 years with the fact that a pipe in the immediate vicinity there over a mile long has lasted for 42 years without a corrosion break.

A. I would explain it this way. The soil——

Q. The what?

A. According to the soil, according to my test out in the street, it is very much less corrosive than the soil under Pier 1, Berth 59.

Secondly, I think probably the drainage conditions are better, favorable to longer life of the pipe.

Q. Where in this area does the soil condition in your opinion change from what you found in the street, this low Corfield reading, to which you found inside the shed? Where is that division line?

A. I don't know precisely.

Q. You think there is down there some very narrow division line between those two soils? [352]

A. Well, I suspect that the presence of sea shells in the one and not in the other would indicate that they are of different origin.

Q. Now, then, assume that you were consultant for the Water Department and that you had been asked in 1939, after that 10-inch pipe had been in there for 25 years without a corrosion leak, if it

(Testimony of J. F. Brennan.)

should be replaced. What would your recommendation be?

A. I would first of all ask for soil tests. I would want to make an inspection of the pipe itself before I drew that conclusion.

Q. Supposing you had done that and you found that the Corfield reading was the same as you had on your sample that you took from Signal Street, 2.8.

A. Supposing it was 2.8 and I found no graphitization on the surface of the pipe, or failure, penetration of maybe 20 to 30 mils, I would say no, don't replace it.

Q. What if they had asked you about the leads coming off of this fire main, one of which is involved in this suit here? If you had known that had been in 25 years, in 1939 what would your advice be?

A. There again I would ask for a test on the soil and I would want to take a look at the pipe. I would form my judgment then.

Q. Would you rely, in forming a judgment, on the test [353] from soil taken inside, underneath the inside of the transit shed, or would you take it in the area where the pipe was located?

A. I would want it in both places, because the pipe extends through the wall.

Q. With reference to the pipe that was running horizontally in the ground, not coming up inside the building, you would want a reading from out there in the earth where it was lying, wouldn't you?

A. Yes.

(Testimony of J. F. Brennan.)

Q. Now, then, if you found it had a high rating in 1939, would it have been your recommendation that that pipe be taken out?

A. I would want to know what the condition of the pipe surface was first.

Q. Let's assume that the condition of the pipe surface—you would have to dig down to it, wouldn't you?

A. Yes, sir.

Q. Would you want to see the pipe around the entire diameter or just on the top surface?

A. I would be content with the upper half of the parameter.

Q. So you would want to dig down and expose half of the pipe?

A. Yes. [354]

Q. And for what distance?

A. Oh, two feet.

Q. Two feet longitudinal along the pipe?

A. Yes, a hole big enough for a man to get into.

Q. This pipe here, if you looked at that just in the manner you have described, exposing the upper half, you wouldn't see any tip-off signs, would you, that any deterioration was taking place?

A. Well, I could see it is rusting, but that's all.

Q. You don't know whether that rust occurred when it was in the ground or after it was taken out, do you?

A. No, but you asked me about this particular pipe, and I say I can see that.

Q. Oh, yes, but I meant, Mr. Brennan, in this hypothetical case in 1939, after it had been in 25 years.

A. Yes.

(Testimony of J. F. Brennan.)

Q. You are going to dig down there before any chance of oxidization sets in, you are going to take a look at that. Now, you wouldn't see, if it is in the same shape it is in now, except for the surface rust, you wouldn't see any sign of deterioration on the exterior of the pipe?

A. Well, if I examined that pipe, I wouldn't simply look at it. I would take a wire brush and clear the dirt off, and I would be very careful about that, because sometimes you brush away the surface of cast iron pipe, and hence you brush [355] it with a wire brush. Then I would take a hammer and chisel and I would test it at various points, and if I found graphitization, I would dig into that and find how deep it penetrated.

Then I would measure it with a micrometer, the depth of the penetration. I would do that in several places on the pipe.

That, together with the conditions I encountered as to moisture and soil index, the depth of corrosion I found here, with that I would then be enabled to form a judgment, but a judgment only as to probable expectancy of that pipe.

Q. Now, assuming that you opened up that hole there, you will have to dig down through the concrete floor of that shed, of the loading platform.

A. Of what?

Q. Pardon me. This pipe was under the loading dock landward of the transit shed. You have that in mind.

A. Just so we don't have a—I always think of a

(Testimony of J. F. Brennan.)

dock as a body of water. You mean the platform there?

Q. Yes. It is the loading platform on the landward side of the shed. A. Yes.

Q. It doesn't have any cover over it?

A. Yes.

Q. It was underneath there that his pipe burst. Now, [356] you dig a hole through that concrete floor and you would go down there to where that pipe was laid, is that right?

A. That's right.

Q. And you would expose it for two feet, and you would take these tappings and you would take your Corfield test, and let's say that the Corfield test came up with 6.5. A. Yes, sir.

Q. Now, then, would you recommend that that pipe be removed?

A. Considering the fact that it serves a—first of all, I am going to ask you what assumption you made as to the depth of corrosion that I found.

Q. I can't make an assumption as to that, because I have no idea what it was at that time. You see what it is now.

A. Well, then I will make an assumption to answer your question. If I found that the pipe was corroded to a depth of 2/10 of an inch, for example, at that time, and I found the soil condition such as you describe, seeing the moisture content, supposing the soil was quite moist at that depth, yes, I would recommend it be replaced.

Q. How much of it?

(Testimony of J. F. Brennan.)

A. I would ask that every one of those leads be examined if I were doing this, for this reason. That failure in there, if the pipe is graphitized and an earthquake comes [357] along, it is quite likely that the pipe will break.

Also, in an earthquake, it is quite likely you are going to have fires, you will have them then, so your fire line is out under those conditions, your pipe is broken, and it is a very serious condition, for which I wouldn't want to assume the responsibility.

Q. You would have every lead checked there on that Pier 1 area then?

A. Every one of those taps from the 10-inch leading into the pier, into the inside of that pier.

Q. This wasn't a tap from the 10-inch we are talking about. That isn't what broke here. These are leads off an 8-inch fire main.

A. All right.

Q. There are two of them going into each berth.

A. All right. Each one of those, then, I would have examined. I would have the floor taken up, broken through, and having encountered that condition in one place, I would certainly feel derelict in my duty if I were charged with that responsibility if I did not have the workmen uncover the rest of that pipe and examine it very carefully.

Q. All right. With reference to this one that you found, first, what would you decide to do about that? Would you take the whole thing out, that whole lead?

The Court: You know, counsel, I think that you are [358] speculating as to what you would do, what

(Testimony of J. F. Brennan.)

the witness would do. The question is not what he would do. The question is what was done. There is no question that this pipe failed. If any engineer had gone down there and made an inspection and saw indications of failure, he would probably have it replaced. There is no question about that. I don't know what you are getting at. You are speculating about what would happen under certain circumstances.

Mr. Yoakum: He said he would take it out in 1939.

The Court: If he found it deteriorated.

Mr. Yoakum: With respect to him, I think it is just historically a ridiculous statement to make, to think that he would take that pipe out in 1939.

The Court: That is up to the court to decide, whether it is ridiculous or not. You might think it is ridiculous and I might not.

Mr. Yoakum: I think I ought to be able to develop the record.

The Court: I think you are going round and round and round, speculating over something which really has nothing to do with this case.

Mr. Yoakum: All right. I will defer that. You told me yesterday you thought there would be considerable cross-examination of this witness.

The Court: You have been cross-examining this [359] witness since 10:00 o'clock this morning.

Mr. Yoakum: I will defer on that subject matter.

Q. When you saw this pipe, you could see its markings, couldn't you, down there at the yard?

(Testimony of J. F. Brennan.)

A. Yes, sir.

Q. And did you see it had a symbol "USCIP" stamped on it?

A. Yes. That was cast into the metal.

Q. And that stood for United States——

A. Cast Iron Pipe, it was United States Cast Iron Pipe & Foundry Company, those initials.

Q. Are you familiar with that company?

A. I have known about its existence for years.

Q. Is it still in existence? A. Oh, yes.

Q. Making this pipe?

A. The best cast iron that is probably available.

Q. The pipe completely held its shape, didn't it?

A. It did. That is one of the characteristics of graphitic corrosion.

Q. What do you estimate these inspections you are telling us about would cost, digging up this floor and going down eight feet to this pipe all along these leads, what would that cost?

The Court: What difference does it make what it [360] would cost? We have got an economic condition here. This witness stated this morning that it is cheaper to take a chance of a break than it is to dig it up and inspect it. You take your chances on it. How would this witness know what it would cost, whether it cost \$10 or \$10,000?

Mr. Yoakum: He is an economic specialist, he said.

The Court: I don't know by looking at a job that he can say it is going to cost so much in dollars

(Testimony of J. F. Brennan.)

and cents. Let's admit it is going to be a very expensive proposition. I am willing to admit it is an expensive proposition.

Mr. Yoakum: I think whether a person is a prudent man or not depends somewhat on what it is going to cost you to take some other course. That was the purpose of asking the question.

The Court: He didn't make any estimate of what it would cost to remove the soil, to dig through the cement, and lay open the pipe. I will take judicial notice of the fact that it would have been a very expensive proposition to have made a physical examination of that pipe.

Q. (By Mr. Yoakum): In your experience does new pipe, recently installed pipe, frequently give trouble, break?

A. Yes. We had, our company had some pipe installed at Mills Field, which is a tidewater area in San Francisco, and we had failures within two years. [361]

Q. Would this pipe last longer if the water around it were fresh water than if it were salt water?

A. I think it would. Of course, if the soil contains some salt, that would furnish a good electrolyte. It would permit this galvanic corrosion to proceed.

Q. Even if it were virtually drinking water?

A. Oh, yes.

Q. It would?

(Testimony of J. F. Brennan.)

A. Surely. Drinking water will conduct electricity.

Mr. Yoakum: That's all.

The Court: Any redirect?

Mr. Verleger: Just a couple of questions, your Honor, and that's all, I promise.

Redirect Examination

By Mr. Verleger:

Q. You spoke of a 2.8 Corfield out in the street. I am not quite clear on it. Is a 2.8 Corfield index actually a good or a bad index?

A. Between 2 and 3 is rated as bad.

Q. One other query. You were asked a good many questions about what the practice in your company is when no difficulties have been experienced. This particular situation, you could assume that on this system serving these various warehouses here, there have been at least two breaks [362] prior to this one, and in addition the meter readings show a flow into this system of approximately 100 cubic feet a day that isn't being used, which has been partially explained on the basis of leaks around joints, things of that sort. Is that a condition where nothing is the matter?

Mr. Yoakum: The question is objected to on the ground it misstates the evidence and doesn't include in it the element that none of these breaks——

The Court: Sustained. I think you are trying to get the witness to speculate.

Mr. Verleger: All right. Your Honor, with that, I will stop, then.

The Court: May this witness be excused?

Mr. Verleger: May this witness be excused?

Mr. Yoakum: Yes, sir.

The Court: You may be excused.

The Witness: Thank you, sir.

(Witness excused.)

The Court: You may proceed. Call the next witness.

Mr. Verleger: Your Honor, we rest.

I did forget one thing, your Honor. We have not as yet offered in evidence our Exhibit No. 1 for identification, this chart here, which was marked by various of the witnesses.

The Court: It may be admitted in evidence.

Mr. Verleger: Thank you, your Honor. [363]

The Clerk: Plaintiff's Exhibit 1 admitted in evidence.

(The exhibit heretofore marked Plaintiff's Exhibit 1 was received in evidence.)

Mr. Yoakum: May we have a direction marker put on, please?

The Court: Oh, yes.

Mr. Yoakum: Because it is misleading the way it is.

The Court: Can somebody mark it?

Mr. Verleger: We will take care of it at the next intermission, if the Court please.

With that, the plaintiff rests.

Mr. Yoakum: At this time, if the Court please, the City makes a motion for nonsuit on two grounds.

One, there has been no negligence shown. If you read the authority cited on page——

The Court: Make your motion and don't argue the motion.

Mr. Yoakum: On the grounds, one, that there has been no negligence established as far as this defendant is concerned.

Two, on the ground that the evidence clearly shows that there was a governmental function here involved and that the requisite notice was not brought to the requisite heads of the departments charged with the correcting. [364]

The Court: Motion denied.

Call your witness.

Mr. Verleger: Your Honor, if counsel would like to take the afternoon recess a little early to get organized, have no objection.

Mr. Yoakum: It is a matter of opinion, but I feel organized.

Mr. Verleger: Okay. I was trying to be helpful.

Mr. Yoakum: Mr. Martin, please.

ARTHUR RAYMOND MARTIN,
called as a witness on behalf of the defendant City
of Los Angeles, having been first duly sworn, was
examined and testified as follows:

The Clerk: You may take the stand, and state
your name, sir.

The Witness: Arthur Raymond Martin.

Direct Examination

By Mr. Yoakum:

Q. What is your occupation, Mr. Martin?

A. I am a civil engineer.

Q. You are employed by the Harbor Department
of the City of Los Angeles?

A. Yes, sir. [365]

Q. And have been for how long?

A. About 37 $\frac{1}{4}$ years.

Q. What is your title down there?

A. I am now assistant harbor engineer.

Q. Are you familiar with the type of construc-
tion of these transit sheds on Pier 1, particularly
referring to transit sheds 58, 59 and 60?

A. Yes.

Q. Will you briefly describe the construction?

A. The structure is classified in accordance with
the Building Code as a Type 5 building. The build-
ing is 100 feet in width and 1800 feet in length and
divided into three sections, each 600 feet in length,
by a concrete division wall at the 600-foot points.

The frame of the building is what is known as
structural steel. That would refer to the roof trusses,

(Testimony of Arthur Raymond Martin.)

which span 100 feet. The roof construction is timber sheathing on structural steel supporting members. The side walls are corrugated metal on steel supporting members.

The face course around the east side of the building consist of masonry at a height of approximately 41½ feet.

Q. Are you familiar with how that building is classified as to occupancy under the Building Code of the City of Los Angeles? [366]

A. Well, it is the most economical type. It was a Class 1, which would be a strictly fireproof building, and you go on down the scale.

Q. I mean as to use. Do you know whether it is classified as to the use under the Building Code?

A. It could be put to different uses. At the present time G-3 would indicate general storage of cargo.

Q. That is its general usage, for storage of goods?

A. Yes.

Mr. Yoakum: That's all I have.

I have some documents that have been marked here that I would like to introduce at this time, but I don't need to examine the witness further.

Mr. Verleger: No cross-examination.

The Court: You may step down.

May the witness be excused?

Mr. Yoakum: Yes.

The Court: The witness may be excused.

(Witness excused.)

Mr. Yoakum: At this time I would like to offer Defendants' Exhibit B, which is Ordinance No. 97629, certified copy, of the City of Los Angeles.

Mr. Verleger: If anybody wants to look at it, I have a better copy.

Mr. Yoakum: That isn't it. [367]

Mr. Verleger: I am sorry.

The Court: It may be received in evidence.

The Clerk: Defendants' Exhibit B in evidence.

(The document heretofore marked Defendants' Exhibit B was received in evidence.)

Mr. Yoakum: The next document, which has not been marked, is a certified copy of Section 5703 of the Los Angeles Municipal Code.

The Court: It may be received in evidence.

The Clerk: Exhibit O in evidence.

(The document referred to was marked Defendants' Exhibit O and was received in evidence.)

Mr. Yoakum: And then a certified copy of Division I, Section 91.0101 of the Los Angeles Municipal Code. There are some further subdivisions.

The Court: It may be received in evidence.

The Clerk: Defendants' Exhibit P in evidence.

(The document referred to was marked Defendants' Exhibit P and was received in evidence.)

Mr. Yoakum: The next one will be a certified copy of Section 91.0301 of the Municipal Code.

The Court: It may be admitted in evidence.

The Clerk: Defendants' Exhibit Q in evidence.

(The document referred to was marked Defendants' Exhibit Q and was received in evidence.) [368]

Mr. Yoakum: Next will be a certified copy of Sections 91.0501 to 91.0506.

The Court: It may be received in evidence.

The Clerk: Defendants' Exhibit R in evidence.

(The document referred to was marked Defendants' Exhibit R and was received in evidence.)

Mr. Yoakum: I will call Mr. Smith, please.

HENRY C. SMITH,
called as a witness on behalf of the defendant City of Los Angeles, having been first duly sworn, was examined and testified as follows:

The Clerk: You may take the stand, and state your name, please.

The Witness: Henry C. Smith.

Direct Examination

By Mr. Yoakum:

Q. By whom are you employed?

A. City of Los Angeles, Harbor Department.

Q. How long have you worked for them?

A. Approximately 11 years.

Q. Where do you work, Mr. Smith?

A. In the engineering department.

(Testimony of Henry C. Smith.)

Q. As part of the engineering department records, do you have a record there showing underground cast iron pipe [369] installations maintained by the Harbor Department in the harbor area?

A. That is correct.

Q. Did you at the request of the attorneys cause to be prepared a summary of these pipe installations?

A. Yes, sir.

Mr. Yoakum: Now I do want to avail myself of Mr. Verleger's offer until I can find that document.

The Court: We will take our afternoon recess. The court will now stand in recess until five minutes after 3:00.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Yoakum): The last question was if you prepared a summary of cast iron pipe in the harbor area at the request of the attorneys.

A. That is correct.

Q. The Harbor Department piping?

A. That is correct.

Q. Did you get that from permanent harbor records?

A. Well, from the drawings, preliminary drawings we made years ago and the available records we have in our engineering vault.

Q. They are part of the permanent records? [370]

A. That is correct.

Q. And you set forth certain information in a summary form, did you?

A. That is correct.

(Testimony of Henry C. Smith.)

Mr. Yoakum: This next document has been marked Exhibit S for identification.

(The document referred to was marked Defendants' Exhibit S for identification.)

Q. (By Mr. Yoakum): I show you this document here consisting of a cover page and the pages Nos. 1 to 15, in addition to the cover page. Is that the document that you prepared?

A. That is correct.

Q. Is this cover page a summary of the information that appears on the other pages?

A. That is correct. This is a summary of pages 1 to 15.

Q. And 10-inch indicates 10-inch pipe underground?

A. 10-inch diameter, that is correct.

Q. And 8-inch and the 6?

A. That is correct.

Q. Calling your attention specifically to one called Terminal 4, I turn to a page called Terminal 4 here. Is Terminal 4 the same as Pier 1?

A. Yes.

Q. And that includes the piping that goes out of Pier 1? [371]

A. That is correct.

Q. And that shows the length and the size and the approximate number of feet?

A. And location.

Q. And location?

A. Yes.

Q. The same with the rest of them, and some sheets you have a terminal, but you show no piping, and at that time——

(Testimony of Henry C. Smith.)

A. As of 3-12-56, we owned no piping in that terminal.

Mr. Yoakum: We offer this summary as Defendants' Exhibit S.

Mr. Verleger: No objection.

The Court: It may be received in evidence.

The Clerk: Defendants' Exhibit S admitted in evidence.

(The document heretofore marked Defendants' Exhibit S was received in evidence.)

Mr. Yoakum: Your witness.

Mr. Verleger: I have no questions.

Mr. Yoakum: May the witness be excused?

Mr. Verleger: Surely.

The Court: You may be excused.

(Witness excused.)

Mr. Yoakum: I will call Mr. Brashier. [372]

CHARLES VINCENT HARVEY BRASHIER,
called as a witness on behalf of the defendant City
of Los Angeles, having been previously duly sworn,
was examined and testified as follows:

The Clerk: You are still under oath, Mr.
Brashier, so you may take the stand.

Will you state your full name, please?

The Witness: Charles Vincent Brashier.

Mr. Yoakum: I will try my best, your Honor, to
avoid covering anything that was covered already,
but I may occasionally fall in error in that respect.

(Testimony of Charles V. H. Brashier.)

Direct Examination

By Mr. Yoakum:

Q. So far as you know, since you have been there, have there been any changes in that lead going off to fire line and into 59, the one that broke, up to March 12, 1956?

A. None to my knowledge.

Q. And you were there all the time since the latter part of 1919?

A. Yes, sir.

Q. What was your duty? I know you were a pipefitter and a pile driver in the early stages of your employment, is that correct?

A. I was a pile driver, then pipefitter and plumber and then plumber foreman. [373]

Q. When you became a plumber, were you a journeyman plumber?

A. Yes, sir.

Q. When did you start acting as plumber?

A. It seems to me it was about the spring of 1922 that I started acting as—I was rated as a pipefitter, but I did both the installation of fire protection work, which is the pipefitting class, and the sanitary plumbing, as it existed upon the docks. There is two separate trades.

Q. And then you became foreman in the '30s, plumber foreman?

A. I became plumber foreman in 1949.

Q. In 1949. Now, while you were plumber and then thereafter a plumber foreman, what was your duty with respect to maintenance of pipes under the Harbor Department jurisdiction?

(Testimony of Charles V. H. Brashier.)

A. Working as a journeyman, I actually repaired or installed new work at the direction of my immediate superior.

Q. Did you do maintenance work in connection with pipes? A. Some.

Q. When the repairs were required to the system, when it became evident it needed repair, was it done by you or by some other plumber in the department?

A. Most major repairs were made by me.

Q. Did you do such work as you considered to be necessary [374] to keep the pipes in operating condition?

A. Only at the instruction of my superior.

Q. From what you observed, did the Harbor Department keep its pipes in good operating condition?

A. Yes, as far as I know.

Q. Did your maintenance work at any time include digging up any of the concrete to see if the pipe didn't show any leak, needed any attention?

A. No. I was never called on to break up or dig a ditch just to find out if there was anything wrong with the pipe.

Mr. Yoakum: I have here a map, and a copy of it has already been furnished to counsel, and I would like to have it marked as our next in order.

The Court: It may be marked.

The Clerk: Mr. Yoakum, I have marked Exhibit T for identification. The reporter should have it in his record.

Mr. Yoakum: Thank you.

(Testimony of Charles V. H. Brashier.)

(Exhibit was marked Defendants' Exhibit T for identification.)

The Clerk: Then this exhibit will be U for identification, this map.

(The map referred to was marked Defendants' Exhibit U for identification.) [375]

Q. (By Mr. Yoakum): Can you see that map, Mr. Brashier, that I have just put on the board, U for identification. If you can't, you may step down here.

A. (Witness leaving stand): I recognize that map.

Q. What does it generally describe?

A. It describes pipe on Signal Street south of 22nd Street, the land side of Berths 57, 58, 59 and 60, six-story concrete warehouse No. 1, and warehouse No. 2.

Q. Does that describe the situation that existed there on March 12, 1956? A. Yes, sir.

Q. I call your attention here to a number, it is upside down, but it is No. 692, more or less opposite Berth 58. I ask you if you are able to tell us what that indicates? A. Right here?

Q. Yes (indicating).

A. That indicates a service connection on the fire main between the city water main, city 10-inch water main, and the Los Angeles Harbor Department 8-inch fire main.

Q. On this map, Exhibit U for identification,

(Testimony of Charles V. H. Brashier.)

there is no pipe shown laterally connecting the 10-inch to your 8-inch fire line. In fact, was there a pipe connecting at that point?

A. Yes, sir. [376]

Q. I wonder if we may put that in with a red line. We will mark that. Would it be right about in the middle of this?

A. No. It would be so it come out just this side of that valve.

Q. The valve?

A. Yes, right there (indicating). 4 to 10 feet.

Q. I will call that red lateral B-1. With that addition, the map clearly portrays the layout there March 12, 1956, does it, as a whole, and the connections off the city main? A. Yes.

Q. The 10-inch main that is down Signal Street wasn't maintained by the Harbor Department, was it? A. No.

Q. That was the main line, main transmission line of the Water Department? A. Yes, sir.

Q. And then the line that more or less parallels it, tell us what that line is.

A. That is the 8-inch sprinkler main or 8-inch fire main.

Q. That was maintained solely by whom?

A. The Harbor Department.

Q. What is the size of these laterals that connect the [377] 10-inch main with the Harbor Department 8-inch main?

A. 8 inches, as I recall it.

Q. Was all the piping shown on that diagram

(Testimony of Charles V. H. Brashier.)

that was west of the Harbor Department's 8-inch fire line maintained exclusively by the Harbor Department? A. Yes, sir.

Q. In other words, the Water Department didn't come in there at all, did it? A. No, sir.

(Witness resuming stand.)

Mr. Yoakum: We offer that map as our next exhibit.

The Court: It may be received in evidence.

The Clerk: Defendants' Exhibit U in evidence.

(The map heretofore marked Defendants' Exhibit U was received in evidence.)

Q. (By Mr. Yoakum): In the month of March, 1956, who had the duty to take care of calls involving any emergency with respect to Harbor Department piping? Is the question not clear?

A. The question is not clear. Who would tell the steamship company, or who would anyone outside of the department call?

Q. When an emergency developed, whose duty was it to take care of any plumbing problems?

The Court: Mr. Yoakum, I don't know what the purpose [378] of these questions is, but as far as I am concerned, the evidence doesn't show there is any fault as far as the City is concerned, or any department, relative to responding and shutting off the water. The evidence has been it took three-quarters of an hour. I don't think that is unreasonable. If you are trying to offset that testimony, I am telling you now as far as I am concerned I don't think

(Testimony of Charles V. H. Brashier.)

the plaintiff has established any negligent action by not being able to respond immediately.

Mr. Yoakum: All right. We will just pass right over that then. Thank you.

The Court: If you go ahead, you might make me change my ruling.

Mr. Yoakum: No, I am not going to do that. I quit when I am ahead.

Q. You dug down or your crew dug down and you personally saw this broken pipe exposed when it was still in the ground, didn't you?

A. Yes, sir.

Q. Where the hole was, was the hole on the down or the up side of the pipe?

A. On the down side.

The Court: Was it clear underneath or was it to one side?

The Witness: More on the bottom. I won't say it [379] was exactly on the bottom, but it was far more on the bottom than on the side.

The Court: If you had gone down and exposed the pipe halfway, you wouldn't have been able to see the hole?

The Witness: No.

Q. (By Mr. Yoakum): Did you make any tests on the neighboring pipe there now? This may have been covered, and if it is, I beg your pardon, but did you check each side of this section that you removed to see how it appeared?

A. Yes, sir.

Q. And you left it in, didn't you?

A. Sir?

Q. You removed about how many feet?

(Testimony of Charles V. H. Brashier.)

A. Oh, I think it was about 9 feet. That is an estimate. I did not measure that.

Q. Did you check toward the source of water from that break to see what the pipe was like?

A. Yes, sir.

Q. And what did you find out by checking?

A. I found the pipe, according to my examination, about—in good shape that I could cut it off to join a new pipe to it to go back to the original.

Q. What was this line used for? What was the purpose of that water? [380]

A. To supply water to the automatic fire sprinklers.

Q. And to the hoses?

A. And to the hoses which were attached to the fire system.

Q. And there is a tank on top of the warehouse 1?

A. I misunderstood your question, but I thought you were speaking of this pipe.

Q. It may be my mistake, but I mean the water that was in that 8-inch fire line, what did it supply?

A. The sprinklers and the fire hoses which were attached to the sprinkler system in that whole area of all of the buildings.

Q. And including that tank?

A. No. The water from the tank supplied the 8-inch line. The water in the tank, most of the time is stationary, except when it gets empty. Then it must be manually filled, and it is manually filled from this 8-inch fire line.

(Testimony of Charles V. H. Brashier.)

Q. This water in this line that broke, was it used for any purpose other than the fire purposes?

A. No.

Q. It was not used for toilets or washroom purposes?

A. No.

Q. Or drinking fountains?

A. No.

Q. Prior to this break in March 1956, do you know of [381] any other corrosion failure of Harbor Department pipe before that March 1956?

The Court: Anywhere in the area?

Mr. Yoakum: Yes.

Mr. Verleger: Objected to as calling for a conclusion, particularly with respect to the corrosion failure.

The Court: Overruled. The question is, does he know of any.

The Witness: Yes.

Q. (By Mr. Yoakum): Where was it?

A. It was under the six-story concrete warehouse.

Q. Do you know when that was?

A. Approximately maybe a year either way of 1926.

The Court: Is that the only instance you know of?

The Witness: Of this type deterioration that he asked.

The Court: That is cast iron pipe.

The Witness: He didn't say breakage. He said corrosion.

(Testimony of Charles V. H. Brashier.)

The Court: That's right, corrosion.

The Witness: That is the only one of corrosion that I recall.

The Court: Where was this six-story warehouse located, approximately? [382]

The Witness: This drawing is an exceedingly dark drawing, but at the left-hand corner.

The Court: So this was in the same area then?

The Witness: Yes, sir.

The Court: But I understood the question was on an installation of the Harbor Department of cast iron pipe.

The Witness: That is the only one I can recall to mind.

The Court: For the whole area?

The Witness: For the whole area.

The Court: For the whole harbor area?

The Witness: That's right.

The Court: May I inquire, the corrosion failure on the six-story warehouse in 1926, did the water come from the same line?

The Witness: Yes. The water come out of this same 8-inch line which supplies that building, as well as 59.

Q. (By Mr. Yoakum): Did you make any study to determine what kind of corrosion caused that break?

A. I did not make any study of it, no, because it was out of my field to even be quoted or to have the ability to quote any reason for it.

The Court: May I inquire, after this corrosion failure in 1926 at this six-story warehouse, was any

(Testimony of Charles V. H. Brashier.)

investigation [383] made as to the condition of the line up and down the street, or was any investigation made of the 8-inch line?

The Witness: Not at the time of that break, only to the extent of where that deterioration quit relative to that line underneath the building.

The Court: Who fixed that?

The Witness: I replaced that pipe.

The Court: You replaced that pipe, and then didn't pay any attention to the rest of the line, is that right?

The Witness: No, sir, I did not go any place else to investigate.

Q. (By Mr. Yoakum): At that time were there any types of electrical equipment regularly traversing Signal Street?

A. The Pacific Electric was doing their switching with electric locomotives.

Q. To your knowledge, was there any method in accepted use of testing buried pipe for this corrosiveness that took place in this pipe?

Mr. Verleger: That is objected to as ambiguous as to what he means by "accepted."

The Court: I suppose you are trying to establish there was no way of inspecting this pipe except by taking it up and looking at it?

Mr. Yoakum: Yes, sir. [384]

The Court: I am willing to take judicial notice of that, the only way you could inspect this pipe is to expose it, dig down and look at it. If you are going to look at it, I think you have to look at it all

(Testimony of Charles V. H. Brashier.)

the way around. I don't know how you are going to look at the top half and not look at the bottom half.

Q. (By Mr. Yoakum): On this pipe that was taken out of the ground, except for this burst area, did you see any indication that the pipe had been abused in any way or mishandled?

The Court: Well, now, the pipe was underground, so except where it was excavated at the break, how could he see any indication that the pipe had been misused?

Mr. Yoakum: I meant the pipe that was taken out.

The Court: I didn't understand you had limited your question to that.

Mr. Yoakum: I meant to. I may not have been too clear.

Q. With reference to this 8 or 9 feet that you took out, and except for the place that gave way, did you see any evidence of abuse and mistreatment of that pipe? A. No.

Q. There has been testimony, I think when Mr. Verleger was questioning you, to the effect that there was a little meter attached to each one of these services running [385] off of the Water Department's main line, is that right?

A. Yes, sir.

Q. That would be a meter with a pipe size of approximately one inch, maybe three-quarters, or maybe an inch, is that true? A. Yes, sir.

Q. The function of it, did you say, was to detect small flows of water? A. Yes, sir.

(Testimony of Charles V. H. Brashier.)

Q. When it ran through that little detector meter, then did it flow back into your 8-inch pipe from that little one-inch pipe?

A. The water goes through from the 10-inch pipe, through the one-inch meter, back into the 8-inch fire main. It by-passes a check valve.

Q. Then it goes back into your system?

A. Well, it goes to the beginning from the back side of the check valve, which is on the city water main south of that valve, and goes around and back into the other side to register a small flow of water which would not push open the heavy 8-inch check.

Q. These detector meters would not measure a large flow of water, if it was big enough to open up the check valve? A. No, sir. [386]

Q. Did the Harbor Department own those meters? A. No.

Q. Were you ever advised about the readings on those meters?

The Court: You personally, or the Harbor Department?

Mr. Yoakum: I meant the witness.

The Witness: I could answer the question yes or no. Sometimes I was called by my office and told that some water had been used in one of these meter detectors, but it didn't occur very often—occasionally. We would go out and look to see if a valve was open some place that would cause a flow of water.

The Court: Do I understand that this flow of water was a continuous flow, or was it intermittent?

The Witness: It could be intermittent unless

(Testimony of Charles V. H. Brashier.)

you had a water leak on this 8-inch main. Say we had a hole, just a half inch of water size. The water would flow, but if that hole was plugged, there would be no more movement in the main.

The Court: If I remember the statement a minute ago, the statement was that there was 100 gallons a day passing through these meters.

Mr. Verleger: 100 cubic feet a day, your Honor, which is seven or eight hundred gallons a day.

The Court: Seven or eight hundred gallons a day. [387] Then that is every day, day after day.

The Witness: Your Honor, that could occur. If we can assume that there was a broken pipe under a dock or some place where the water would not be in evidence, no one would notice this leak until such time as that meter was read before anyone would know that there was one there. Then the Water Department of the City of Los Angeles would know that we are using water that we are not entitled to use. That is the primary reason for putting that little meter on there.

The Court: But if day after day your meter showed the use of 100 cubic feet of water, that water had to go somewhere, it had to be dripping from the pipes, or it had to be dripping from a broken line, or something.

The Witness: May I explain it to your Honor?

The Court: I wish you would, yes.

The Witness: On this particular system there, there was 36 two-inch drain valves. Anyone could open one of them, or any of them could leak a steady

(Testimony of Charles V. H. Brashier.)

leak, or any number of them, which would cause some loss of water. Any leak in the joints of the pipe would cause some more loss of water, in approximately 6000 feet of pipe. A surge in pressure would surge from the 10-inch main, which goes down along the street, and shoot through these check valves and go up through the alarm valve, and on the alarm valve you had a retarding chamber to keep away false alarms, and extra water [388] shooting through there each day would then drain away without giving an alarm or knowing the water was used.

The Court: Would you consider the fact that a hundred cubic feet of water was going through these meters an indication something was seriously wrong with your system?

The Witness: Yes, sir, if that occurred every day.

The Court: As far as I know from the testimony, this 100 cubic feet was going through there every day. I don't know for what period of time.

The Witness: That would make quite as much mystery to me as it would to you, that that much water got away and no one knew about it.

Mr. Yoakum: If your Honor please, I would like to get something straightened out here.

The Court: Do we have a statement from the City as to the charges for the water?

Mr. Yoakum: Yes. This is in evidence. In the month of January, the reading of January 1956 on

(Testimony of Charles V. H. Brashier.)

one—there were three of these meters—on Service No. 8849, that is the most northerly of these meters, we had 100 cubic feet running through there in a month, 100 cubic feet a month.

On Service 2692, which is the middle one, we had 800 cubic feet. On this one——

The Court: What is the number?

Mr. Yoakum: 2690, we had 2500 cubic feet. That is [389] what we had in a month. In the next month they had 45 in the aggregate.

The Court: Forty-five hundred?

The Witness: Forty-five hundred.

In the reading of March 1st, which is the last reading before the break, there were thirty-four hundred.

Mr. Verleger: Actually, also, counsel, if you allow for the differing number of days in the reading of the meters, it evens out. They read them sometimes 30 days apart, sometimes 20, but the average is in excess of 100 cubic feet.

The Court: You still contend that the daily average was 100 cubic feet going through this?

Mr. Verleger: The first month was 3400, and if you divide that by 30, it will be over 100. The next month you have forty-five and you divide that by 30 and you come up with something over 100 cubic feet.

My impression is you can take the number of days, which was a few more than 20, for the March 1st reading, and it comes out about the same.

Likewise, the City Water Department records of

(Testimony of Charles V. H. Brashier.)

reading those meters showed this condition hadn't just started in those three months, but had run along in a similar style for a period of years.

Mr. Yoakum: I want to point out to the Court, this [390] is argument, I think, but I want to point out to the court the fact that there were leaks on readings of these meters doesn't mean at all that this pipe there, this subject pipe was leaking. That was a burst.

As the plaintiff's witness testified, Mr. Drake, I think, he testified that that type of thing breaks, bursts, and there is no dribble out of that. The leak in this system, as the witness has said, comes from joint leaks, leaded joints, nothing to do with the break at all. You try to locate it. Naturally, you can't always locate a leak from a leaded joint that is buried way down in the ground.

He has also told you some of the other reasons why there is a reading there. We haven't got far enough along in his testimony to bring out what I think will be brought out, that this isn't very much water.

The Court: You don't think 100 cubic feet is very much water?

Mr. Yoakum: Not in a system like this.

The Court: I just asked him and he said he thought it was considerable.

The Witness: I didn't mean it as you said. I meant to tell you, your Honor, I didn't know how they accounted for the 100 a day, it would be a mystery to me, except through this that I have told you.

(Testimony of Charles V. H. Brashier.)

After all, 100 cubic feet a day doesn't represent much more water than two people will use [391] during a day in their own home.

The Court: Do you have any opinion whether or not any of this water that went through those meters in January, February and March, prior to the break, went out through the break or——

The Witness: I would almost positively say no. A condition of this kind, it is my experience that one second it is together and the next second it is gone.

The Court: It would be your opinion this 100 cubic feet a day escaped from the system at some other location?

The Witness: Yes, sir, not through this hole.

Mr. Yoakum: While we are on that subject, I think you might be interested in noting that these bills show we were billed a flat rate for each service—two of the services they charge this \$10.50 a month, and one of the services they charged us \$18.50 a month, as these bills will show. We have in evidence here the bills starting with the period of November 1955 and going through to April 26, 1956.

To show you the small amount of charges that we were charged for, in addition to this flat rate, for the bill in January on one of the meters, we were charged \$4 over our basic rate.

The Court: Let me ask this witness a question, will you?

Mr. Yoakum: All right, your Honor. [392]

(Testimony of Charles V. H. Brashier.)

The Court: The fact that 100 cubic feet of water was going through the meters a day, would that indicate to you in any way that there was going to be any failure of the system?

The Witness: No, sir, for reasons like I spoke about for the loss of that water.

The Court: Would the loss of that much water indicate that the system was failing at any particular point or at many points?

The Witness: The area in which this water is served, we term a dead end. If anyone takes water above 22nd Street, they start a great surge of water, and the more water they take out of this 10-inch main, the greater the surge. When they shut it off, the water doesn't just stop. It continues with its force and it builds up and it opens and runs through these meters, building up the pressure, which raises another check valve in the alarm valve, which has a retarding device on it, and the water runs through there and runs away without giving an alarm. That is filled into a closed drain at each surge. It is why they have these retarding devices which do away with false alarms which cause the fire department and everyone to run around. That is why the water gets out. Otherwise, it would build up such a great pressure that it would soon blow your pipe apart.

Mr. Yoakum: So that there won't be any confusion [393] about it, this figure of 100 cubic feet per day, that is distributed among the three meters. It is not any per meter basis. It is all over that area.

(Testimony of Charles V. H. Brashier.)

Q. Did you tell the court about the three-quarter inch inspector's test valves that are in the system?

A. In each one of these fire systems which were—attached to the No. 36, I believe there were a couple of extra ones that were in there over that—there is a three-quarter to a one-inch valve called an inspector's test, which the Pacific Fire Rating Board, which used to be a part of the Board of Fire Underwriters, set up, and there is an inspector who goes around every so often and he opens the valves to test the alarm and test the devices to see that they work. They are situated beside the building near the sprinkler riser, about five feet six above the ground, and they flow into a closed drain. It has been my experience that we have found many times those valves to be partially open. As my crew would go through the warehouse, they were instructed to look at these valves, because the longshoremen, out of idle curiosity, oftentimes would come along and open one, not enough to give an alarm, but enough to let a stream of water run, and it would again run away out of there and the amount of water that would go through the alarm valve would go back out to your retarding device.

There wasn't enough water to force an alarm, and it [394] might run for two or three days, but it would represent possibly maybe a one-eighth, perhaps three-sixteenths stream of water, sometimes more.

Q. You say it goes into a closed drain?

A. They empty into a closed drain. In other

(Testimony of Charles V. H. Brashier.)

words, it would be impossible to spill water into the building in which they are so that anyone would notice they were leaking. The only way you would know would be turning them on, someone go by and checking.

Q. Where does the closed drain empty?

A. It runs into the ground, under the ground and out underneath the building into the bay.

Q. So if these valves are left open, they might run for quite a while before it would be noticed, is that correct?

A. Yes, sir.

Q. Do you know how many fire hoses there were in that system there, off the fire alarm system, in March 1956 and the months prior thereto?

A. I will estimate that it—approximately 38, between 36 and 40.

Q. Did you ever come in and see them lying around on the ground, I mean on the floor of the shed, wet?

A. Yes, sir.

Q. While I have got you here, I might as well ask you about this map. I don't know whether you are familiar with it [395] or not. Do you know what that map is that is marked here as Exhibit A for identification?

A. Well, it is a general layout of the harbor. In most parts of it, the terminals are marked off.

Q. You can recognize it as a fair depiction of the channel layout area?

A. Yes, sir.

Q. Do you see the area that is indicated in red?

A. Yes, sir.

Q. Can you tell that is Pier 1?

(Testimony of Charles V. H. Brashier.)

A. From here I would say that is the Signal Street pier.

Mr. Yoakum: We will offer that map as Exhibit A.

The Court: It may be received in evidence.

The Clerk: Exhibit A in evidence.

(The map heretofore marked Defendants' Exhibit A was received in evidence.)

Mr. Yoakum: I think I have nothing further.

Mr. Verleger: Your Honor, it is about 4:00. Would it be better if I commence examining in the morning?

The Court: I think we better continue with the cross-examination. Can you tell me, are we going to be able to finish this case tomorrow?

Mr. Yoakum: I think we will finish my evidence tomorrow, barring some long cross-examination, but I think I [396] will finish my evidence.

Mr. Verleger: I don't anticipate any long cross-examination. I will be surprised if this is the kind of case where rebuttal will be useful.

The Court: How long will it take you to cross-examine this witness?

Mr. Verleger: 15 or 20 minutes.

The Court: Before you start your cross-examination, Mr. Yoakum, in regard to Exhibit S, which is the number of feet of cast iron pipe in the harbor area, this says prior to 3-12-56, and it gives the date of installation. Do I understand from this exhibit that the pipe on this exhibit is still in use?

(Testimony of Charles V. H. Brashier.)

Mr. Yoakum: Up to this time.

The Court: Up to 3-12-56?

Mr. Yoakum: Yes, sir.

The Court: This is the pipe the defendant installed and it was still in use on 3-12-56.

Mr. Yoakum: Yes, on the date of the break.

The Court: I wanted to be sure I understood that.

Cross-Examination

By Mr. Verleger:

Q. Mr. Brashier, a minute ago you testified it was your experience a break like this went all at once. Were you [397] referring to graphitic corrosion? A. Yes.

Q. What was the experience to which you refer?

A. That I had never removed anything of this type but what it was always just a great big—

Q. My question was, how many times had you done that before?

A. There was twice I did that.

Q. So that when you speak of your experience with graphitic corrosion failure, you are speaking of this one instance and the one back in 1926?

A. 1926, yes, sir.

Mr. Yoakum: Just a minute. I don't think the witness testified that that was a graphitic corrosion failure in 1926.

The Court: I think he said it was a corrosion failure.

Mr. Yoakum: He said it was corrosion, that's correct.

(Testimony of Charles V. H. Brashier.)

Q. (By Mr. Verleger): At any rate, when you said it is your experience those things happen all at once, those are the two cases you have in mind, is that right? A. Yes, sir.

Q. Now, to step back a little bit further, there have been a number of breaks at various times in the pipe of the harbor and particularly in this immediate area, other than [398] the two that you have just referred to, have there not?

A. How many is several?

Q. There have been several.

A. How many is that?

The Court: More than two.

Q. (By Mr. Verleger): More than two.

A. Yes, more than two.

Q. In this immediate area there have been at least three more, isn't that correct?

A. How far is immediate?

Q. On Pier 1. A. Yes.

Mr. Yoakum: He is talking about breaks of any kind now.

Mr. Verleger: Breaks of cast iron pipe under this gentleman's jurisdiction on Pier 1.

The Court: Well, we are only interested in breaks caused by corrosion.

Mr. Verleger: Your Honor, what I was going to get at next, if I may—I think I can clarify what I am getting at in just one or two more questions.

Q. You weren't present when all the pipes in question were taken out, were you?

Mr. Yoakum: I object to the question. [399]

(Testimony of Charles V. H. Brashier.)

The Court: Overruled.

The Witness: No.

The Court: You can answer.

The Witness: I have been on vacations and been away and there could be things done, when I was not present when they were done.

Q. (By Mr. Verleger): Particularly, there was one out in front of Berth 59 October 11, 1955, out in front of Berth 59, there was a break in an 8-inch main there and you were not present when that was examined? A. That is correct.

Q. The plumbers under you have no instructions to check particularly for the presence of graphitic corrosion, isn't that correct?

A. If they were repairing the leak and they found it, yes.

Q. My question is, they are not under any instruction to make any examination, that is, by scraping away at the iron, or anything of that sort, to see if graphitic corrosion is present, is that correct?

A. A man would not instruct a journeyman exactly where to stop or repair, even if he was present. If he sent him out to repair, he would leave it to his good judgment to see the pipe was good where he repaired it. [400]

Q. So they have no instructions on that point at all, is that right?

A. No, because they are journeymen. No.

Q. Just so I am clear, of your own knowledge you don't know whether or not some of the other

(Testimony of Charles V. H. Brashier.)

breaks which occurred in this area were or were not due to graphitic corrosion?

A. I didn't see them, no.

Q. With respect to the steady flow that was going through here, you testified a little while ago——

Mr. Yoakum: Just a minute. I object to counsel's designation of that as a steady flow. If you look at those records, you will see it was not a steady flow. Sometimes there was no flow through there.

Mr. Verleger: With all due respect to counsel, I know of no time in the period of——

The Court: Objection overruled. Go ahead. I will evaluate the testimony, and also the question of counsel.

Q. (By Mr. Verleger): With respect to this flow, I take it, you testified a little while ago that the reason for this flow of approximately 100 cubic feet a day was a mystery, and I take it no one advised you prior to the commencement of this litigation that there was such a flow through these mains?

A. No one advised me. I knew from having worked with these devices that there is always a flow at different times. [401] Every time you have a false alarm, you must have a flow of water.

Q. Did you know during the three months preceding this particular break, that there was a flow of approximately 100 feet a day flowing through there? A. Will you rephrase that?

Q. Did you know that during the three months

(Testimony of Charles V. H. Brashier.)

preceding this break there was a flow of a couple of hundred cubic feet a day running through there?

A. No.

Q. What leaks do you remember so far as this building——

Mr. Verleger: Your Honor, perhaps that is covered fully. I think, your Honor, I have no further questions.

Mr. Yoakum: No questions.

The Court: You may step down.

(Witness excused.)

The Court: Court will stand in recess until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken until Friday, October 10, 1958, at 10:00 o'clock a.m.) [402]

Friday, October 10, 1958—10:00 A.M.

The Clerk: No. 20624-HW Civil, Grace & Co. (Pacific Coast) v. The City of Los Angeles, further trial.

Mr. Verleger: Ready for plaintiff.

Mr. Yoakum: Ready.

The Court: You may proceed.

Mr. Yoakum: Call Mr. Alderman, please.

FRANK E. ALDERMAN

called as a witness on behalf of the defendant City of Los Angeles, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the witness stand, sir, and state your name, please?

The Witness: Frank E. Alderman.

The Clerk: How do you spell your last name?

The Witness: A-l-d-e-r-m-a-n.

Direct Examination

By Mr. Yoakum:

Q. Where do you reside, Mr. Alderman?

A. 1508 Wayne Avenue, South Pasadena.

Q. Where is your place of business?

A. 1520 Osley Street, South Pasadena.

Q. What is your business? [405]

A. Consulting civil engineer.

Q. Do you have a firm name under which you operate?

A. Yes; Alderman & Swift.

Q. Are you a licensed civil engineer?

A. Yes; I am, in the State of California.

Q. What is your preparatory instruction, your schooling?

A. I graduated in 1934 from the California Institute of Technology with a B.S. in civil engineering.

Q. After graduating from the California Institute of Technology, did you go to work?

A. Yes; I did.

Q. Will you chronologically, as best you can,

(Testimony of Frank E. Alderman.)

tell the various occupations you have been engaged in since you went into business?

A. I went from school to work for Fluor Corporation, the Fluor Construction Company, in Los Angeles and in Illinois for them, working on construction work, surveying, drafting.

In 1932 I went to work for the Goodyear Tire & Rubber Company. Was with them for about five years in various departments, mostly in their engineering department.

In 1938 I went with the City of South Gate, and in the latter part of that year or the first of 1939 became city engineer of South Gate.

Q. What were your duties and what did you do in that job? How long did you hold that job? [406]

A. Seven years.

Q. What did you do in that job?

A. I had charge of the engineering department, the water department, streets, sewers, and allied functions.

Q. Specifically, with reference to underground piping, what were your duties, if any? What did you do?

A. I had complete charge of the water system, its operation, design of new facilities, designed and built several new areas of castiron water mains, installed castiron water mains in several areas of the city, operated the system in its entirety.

Q. You left there, that employment, some time in 1945. What happened then?

A. I went with Holmes & Narver.

(Testimony of Frank E. Alderman.)

Q. Will you tell us what they are?

A. They are a consulting engineering firm in Los Angeles. I went with them originally to make a study of the water system at the Inyokern Naval Base and to write a report on that system. I wrote the report and then supervised the design of certain improvements to the system based on recommendations in that report. That lasted until about October of 1945.

At that time I went back into the Los Angeles office. I had been at Inyokern during most of the previous time. I worked for them then until 1949, designing various [407] facilities for cities, for the Army and Navy, and various other clients. These consisted of civil engineering facilities, including water systems, sewers, and storm drains.

Q. This Inyokern system related to work on underground water pipe, did it? A. Yes.

Q. While you were with Holmes & Narver, did you have any overseas assignment?

A. Yes. I went to Okinawa for a period of about two months on special assignment to design water and sewer facilities, and upon completion of that work came back.

Q. That was for the Army?

A. Yes. Holmes & Narver were doing it for the Army.

Q. Did that work entail working with underground pipe? A. Yes.

Q. Since 1949, when you opened your own office, tell me just generally the nature of your clientele

(Testimony of Frank E. Alderman.)

and business activities, and particularly related, if you had any, to activities concerning underground cast iron pipe installations.

A. Well, we have designed cast iron pipe for a number of cities, including Escondido, Manhattan Beach, and various others, many water districts, written reports, complete comprehensive reports for about eight or ten cities, El Segundo, Arcadia, Glendora, Manhattan Beach, Brea, and a number of others, as well as many water districts and mutual water companies. [408]

Q. During the course of your career, have you done any theoretical, as distinguished from practical work, in connection with pipe installations, I mean studying of texts, familiarizing yourself with water operations, water line operations generally in the country?

A. Yes. I have followed the trade literature quite closely for 20 years or more and have read many such articles.

Q. Did you in the early part of 1958 at my request go down to the harbor, specifically to the area known as Pier 1, on which Berth 59 resides?

A. I didn't catch the date you mentioned, but I can give you the exact date I did go down there.

Q. Are you looking now at some notes that you made, that you prepared?

A. Yes, if I may refer to them. On March 21, 1958, I did visit the harbor for that purpose.

Q. Did your associate, Mr. Swift, go with you?

A. Yes; he did.

(Testimony of Frank E. Alderman.)

Q. Did you meet Mr. Perkins of the Harbor Legal Department, this gentleman over at the table?

A. Yes.

Q. Where did you go? Just tell the court what you did when you got down there.

A. Well, we visited the site at Berth 59 where we were [409] told that the sprinkler main had broken, were shown the location, and after looking that over, went over to the Harbor Department yard and were shown certain sections of pipe, which we were told came out of the line which had broken.

We took some photographs of these various pieces of pipe and I asked that a piece be cut off one of them and delivered to my office. I gave instructions as to where it was to be cut and how.

Q. Was it cut while you were there?

A. Not while I was there, but it was cut and delivered to my office later.

Q. Is this the one that was delivered to you?

A. Yes; it is.

Q. Did it have that marking on there that appears to be a part of it, a 5 and a 9?

A. There was a part of a 5 and a 9, yes. If you care to, that fits on one of these pieces down here, and the 5 can be matched up with the portion of 5.

Q. On this one here, that is Exhibit G, is that the match-up you refer to?

A. Yes. This piece broke off later. That is the way it matches, like that.

Mr. Yoakum: That piece, your Honor, was marked V. I should have told Mrs. Smith. I think

(Testimony of Frank E. Alderman.)

it ought to be marked [410] a part of this series instead. It would be G-3, this little section.

The Clerk: I will make it G-3.

(Exhibit referred to was marked Defendants' Exhibit G-3 for identification.)

Mr. Yoakum: We will now offer that little section in evidence.

The Court: It may be received.

The Clerk: Defendants' Exhibit G-3 received in evidence.

(Exhibit heretofore marked Defendants' Exhibit G-3 was received in evidence.)

Mr. Yoakum: Now I want to have some photos marked.

The Clerk: Defendants' Exhibits V, W, X and Y marked for identification.

(Photographs were marked Defendants' Exhibits V, W, X and Y for identification.)

Q. (By Mr. Yoakum): Will you just hold those photographs so the court can see them, if he wishes to look as we talk about them? Take them in number there and just tell for the record what those pictures portray.

A. No. 1 shows a section of the pipe with a large hole in it. It is my understanding that this is the piece where the main break occurred. Also shown in the upper right-hand [411] corner are some of the miscellaneous fittings which I understand came from that vicinity.

(Testimony of Frank E. Alderman.)

Picture 2 shows a closer view of the hole in the pipe, the large hole, and also a smaller hole to the right of it, and also in the upper portion some of the fittings.

Picture No. 3 shows the spigot end of that section of pipe, with the No. 59, a portion of the No. 59 visible there, which is painted on that end. It also shows to other short pieces of pipe in the upper portion.

Picture No. 4 shows the same end of the pipe that is shown in Picture No. 3, and shows, if it is examined closely, the figure 8 can be seen on it. That is the point at which we ordered the pipe to be cut, and the 8-inch portion to be delivered to my office.

Q. Those pictures were taken while you were present? A. I took the pictures myself.

Q. You took them? A. Yes, sir.

Q. Subsequently, I take it, in the next week, the section that we have marked Exhibit 3, this 8-inch section, was delivered up to you, is that correct?

A. Yes.

Q. Is that shown in No. 5?

A. That is shown in photograph No. 5.

Q. And that was also taken by you or in your presence? [412]

A. All of these photographs were taken by me.

Q. All four sheets?

A. Yes; that is correct.

Q. After you got that section that is shown in picture No. 5, what did you do?

(Testimony of Frank E. Alderman.)

A. I was interested in making a test of this, a bursting test. I arranged with Pipe Linings, Incorporated, to machine some parts which could be used in applying pressure internally to this section of the pipe to determine its bursting strength.

Q. What does No. 6 show there?

A. No. 6 shows two steel plates, which had been machined by Pipe Linings, Incorporated, in their shop. These are circular pieces of one-inch steel plate with eight holes bored around their periphery for one-inch bolts. Also, each one has a section machined out, a slot to receive the end of the pipe. The pipe is sitting in the slot on one of the plates, and the other plate is shown turned upward. This plate should be inverted and placed on top of the pipe, which is its position in the test.

Q. Those plates are the same things that are referred to as flanges?

A. Yes; they are a type of flange. The slot in the plate is machined considerably larger than the outside of the pipe so that there is plenty of room for movement of the [413] pipe expanding in the slot without coming against the shoulder of the slot.

Q. Now, will you please explain No. 7?

A. No. 7 shows the pipe and flanges being assembled with one-inch bolts, gaskets were placed in the slots, rubber gaskets which I have here (indicating), and one was placed at each end of the pipe to keep water from leaking out. Then the

(Testimony of Frank E. Alderman.)

whole was assembled with these bolts and they were tightened down to prevent leakage of water.

The one flange had a hole in it tapped for a piece of pipe to be screwed in, and that was to introduce water inside the pipe.

Q. Now, then, No. 8?

A. No. 8 shows the entire assembly with the pipe connection from a source of water and with a small hand pump and a pressure gauge, the pressure gauge being between the hand pump and the pipe assembly.

Q. No. 9, is that just about the same as 8?

A. Yes. No. 9 is a close-up of the assembly and shows a portion of what No. 8 shows.

Q. No. 10, just explain that a bit, please.

A. No. 10 is a close-up, also, of a portion of what is shown in No. 8. That is the small hand pump and the pressure gauge.

Q. Now, turn to the big picture for just a moment, No. [414] 11. That is just a close-up of that hand pump and pressure gauge?

A. That's right.

Q. Is that while the test was being made?

A. Yes; it is.

Q. The reading on there of 400, what does that indicate?

A. That indicates the pressure on the inside of this section of pipe at the time the picture was taken.

Q. Measuring in what?

A. In pounds per square inch.

Q. Then go back to the sheet we left, and direct-

(Testimony of Frank E. Alderman.)

ing your attention to photograph No. 12, just tell the court briefly about that.

A. No. 12 was taken immediately after the pipe failed by bursting. The pressure at the time the pipe burst was just slightly over 500 pounds per square inch, and the pipe ruptured longitudinally throughout its complete length at just over 500 pounds per square inch.

Q. Is that rupture apparent here on the exhibit?

A. Yes; it is. It is a longitudinal crack with a very slight offset in it of about a quarter or three-eighths inch.

The Court: I would like to know what this 500 pounds per square inch means?

The Witness: Well, sir, it means that this [415] piece of pipe taken within a very few feet of the main rupture in the pipe withstood an internal pressure of 500 pounds per square inch.

The Court: Is that low, high, or what?

The Witness: The working pressure, I understand, at the time of the rupture in the pipe was about 65 pounds per square inch. It means it stood something over seven times as much pressure as the section in its immediate vicinity, within four or five feet, and in the same piece of pipe, the same length of pipe that the rupture occurred in.

Mr. Yoakum: We would offer these four now, V, W, X and Y.

The Court: They may be received.

(Testimony of Frank E. Alderman.)

The Clerk: Defendants' Exhibits V, W, X and Y in evidence.

(The photographs heretofore marked Defendants' Exhibits V, W, X and Y were received in evidence.)

Q. (By Mr. Yoakum): While you were down at the harbor in March of this year, did you study the larger pieces of pipe that had been pointed out to you as the one that had broken?

A. Yes.

Q. What did your study consist of and what did you conclude?

A. Well, the examination of those indicated that there [416] were areas in those pieces of pipe which were very soft, and these areas were on the external portion of the pipe. They could be cut rather readily with a penknife, and on examination of them in most cases, except where they had been already hammered on or cut, this softness of the pipe was not apparent until an instrument of some sort, such as a knife, was brought against it and it was cut in that manner.

Q. When you say softness, can you indicate what you mean by that on any of these pieces of pipe that we have here? Is there any of that softness left? Here is a piece that has been etched out. I don't know whether that would be easier to work with.

A. Well, there is some right there, you see (indicating).

(Testimony of Frank E. Alderman.)

Q. Is that what you scraped off, would you characterize that softness? A. Yes.

Q. What is that in the main?

A. Well, that primarily is carbon or graphite.

Q. You concluded from your study that this pipe had undergone a type of corrosion—what is the name?

A. It is generally called graphitic corrosion.

Q. Is this something entirely different from what we commonly refer to as rust?

A. Yes; it is. [417]

Q. Will you explain that?

A. Graphitic corrosion is a form of electrolysis. Cast iron is composed of iron and carbon primarily, and most of the carbon is not combined chemically with the iron, but, rather, is in the mixture as separate small pieces. It has been described in some of the literature as like cocoanut in a candy bar, or could be described like rock in concrete. These are minute, but are separate pieces. In the presence of an electrolyte such as water and any of the salts which are always present in water to varying degrees, a small battery is formed between each of these small particles of carbon and the adjacent iron. The current is induced to flow just as in the ordinary battery from the carbon cation to the anion, which is the negative side of the battery.

Q. What is the name of the negative?

A. The anion.

Q. And the name of the positive?

A. Cation.

(Testimony of Frank E. Alderman.)

Q. Are those different terms from cathode and anode? A. They are the same.

Q. They are interchangeable?

A. Well, I think so. Possibly cathode and anode would be a better term, if I may use those?

Q. The anode is the negative?

A. The anode is the negative, yes. The anion acts as [418] the negative side of the battery, and just as in any electric circuit, current must make a complete circuit, and it flows then through the electrolyte back to the carbon. This takes with it a certain amount of the iron and the iron goes into solution in the electrolyte. In that way, the iron is taken out of the casting while still leaving the carbon in its original position. That is the reason that this type of corrosion is not readily evident on the surface, but the surface may retain all of the irregularities and markings which the original had even after this corrosion has taken place.

Q. From looking at the surface, could you tell whether it was subject to graphitic corrosion?

A. No; not any that I could find that you could tell without trying it to see if it can be cut or not. I think that is quite evident, if you want to use the small piece which we cut, the small 8-inch-long section, that can be shown on that.

Q. From your experience, do you have an opinion as to whether a reasonable waterline maintenance practice would require digging up pipe of this type and in this soil, assuming the soil is highly

(Testimony of Frank E. Alderman.)

corrosive, from time to time to look at it before any trouble had developed?

A. In the line, no. I have never heard of doing that.

Q. Do you know of any method by which a person can [419] detect from the surface of the ground a trouble in a pipe that is buried several feet under the ground, water pipe? A. No.

The Court: The only way to inspect is to uncover the pipe and look at it?

The Witness: Yes. That would be the only way I would know to tell what its condition was.

Q. (By Mr. Yoakum): In your opinion, would the uncovering of a pipe like this be likely to be hazardous?

A. Well, yes, whenever you uncover a pipe, if you uncover any appreciable amount of it, you run the risk of disturbing it structurally, reducing its support that it has, and you may set up stresses in it which would be hazardous.

Q. Do you have an opinion as to the caliber of that pipe as of 1914 or before 1920? How did that pipe stack up as to quality, cast iron pipe?

A. Cast iron pipe at that time was far and away the best pipe available for waterline purposes. It was generally either that or steel pipe, and steel pipe then was—the protection available for it was not the caliber it is today, so that it was the best available.

Q. From your studies, are you familiar with the

(Testimony of Frank E. Alderman.)

length of time that cast iron water pipe had been in operation throughout this country? [420]

A. Well, it had been in service in this country in many instances over a hundred years. There is what was called, I believe, the 100-Year Club, that the cast iron people issue lists of, listing quite a large number of cities, mostly in the East, of course, which have had pipe for a hundred years or more. I say in the East, of course, because out here they haven't been in operation that long generally.

Mr. Yoakum: That's all I have, your Honor.

The Court: Cross-examine.

Cross-Examination

By Mr. Verleger:

Q. I just want to be clear on this before I start in. Let me ask you this: Is the pipe which has graphitically corroded as good as the pipe which has not graphitically corroded? A. No, sir.

Q. In other words, I take it the process of graphitic corrosion increases rather substantially the likelihood of failure?

A. It is deleterious to the pipe, yes, and reduces its strength.

Q. Now, further, this is correct, is it not, that is, that graphitic pipe has not been installed newly in this area, in areas that are highly corrosive, since 1945, is that correct? [421]

A. I didn't quite hear you.

(Testimony of Frank E. Alderman.)

Mr. Yoakum: Would you mind restating the question?

The Court: Just a minute. Would you mind getting behind the lectern? We have that there for a purpose, you know.

Mr. Verleger: I am sorry.

Q. Has cast iron pipe been newly installed in this area in areas that are known in Los Angeles to be highly corrosive since about 1937?

A. Yes.

Q. Is it generally used in such areas?

A. Yes.

Q. Now, Mr. Ashline testified earlier that the City of Los Angeles had ceased using such pipe in such areas at about that date.

Mr. Yoakum: I object to the statement. It is a misstatement. It is probably inadvertent. Mr. Ashline said that they did not use what he called unprotected cast iron pipe, explaining that they coal-tarred or enameled it.

Mr. Verleger: I think counsel is correct. I will restate the question.

Q. I take it when you refer to the use of cast iron pipe in hot areas—I should probably have asked the question differently.

Has unprotected cast iron pipe been used substantially [422] in this period of time in highly corrosive areas? A. Since 1937?

Q. Yes.

A. Well, what degree of protection is put on pipe varies a great deal among different water

(Testimony of Frank E. Alderman.)

systems. There are some—I don't know the count now, but I am sure it is in several hundred water systems in Los Angeles County, certainly in Southern California, at least, and I think it was over 60 in Los Angeles County at one time several years ago, and each one has its own practices. I am sure that many of them have put unprotected cast iron pipe in the ground in areas which were corrosive.

Q. Suppose I put the question a little bit differently. Is it thought to be good engineering practice over that period of time to put unprotected cast iron pipe in highly corrosive soil?

A. It is better practice to protect it, if possible.

Q. I take it that a competent engineer with unprotected cast iron pipe in highly corrosive soil would know that the likelihood of failure was substantially greater than in soil that was not highly corrosive, would he not?

A. Yes; I should think so.

Q. Now, I want to refer back to this. You spoke of the importance of an electrolyte in the causing of graphitic corrosion. I take it in a pipe which is in soil which would [423] otherwise be highly corrosive, but is dry on the exterior, that pipe isn't nearly as likely to corrode as one that is damp, is that right?

A. Yes. Moisture must be present to some degree.

Q. I take it again that this would mean if you are interested in protecting your pipe against

(Testimony of Frank E. Alderman.)

graphitic corrosion, and you are aware that conditions of leakage and the like are around the pipe, which would indicate the presence of moisture, it would be desirable so far as possible to correct it, isn't that correct?

A. May I hear that again?

Q. Surely. Will you read it?

(Question read.)

The Witness: I didn't understand the part about leakage around the pipe.

Q. (By Mr. Verleger): Let me rephrase the question. As far as you can, it would be desirable to eliminate leakage of the pipe system, wouldn't it?

A. That is always desirable, to eliminate leakage, yes.

Q. And the presence of leakage in and of itself around a pipe would tend to accelerate corrosion, isn't that correct?

A. Well, I can think of instances where it wouldn't, but moisture around the pipe would tend to accelerate corrosion.

Q. Now, I want to refer to this section you tested [424] there. In selecting the section that you tested, did you use any particular criterion?

A. Yes. We took it from the end of the same pipe that had failed.

Q. Did you pay any attention to the presence or absence of graphitic corrosion in the section that you selected?

A. It didn't have as much as immediately ad-

(Testimony of Frank E. Alderman.)

jacent to the place where that section had failed, but there was some evidence of it in that section.

Q. In other words, however, you picked a section where graphitic corrosion hadn't progressed as far as it was immediately in the area immediately adjacent to the break, is that right?

A. Yes; that's right.

Q. One further question. Again, isn't it common today, in installing pipe entries into buildings and the like, to guard against the result of failure such as we have here by installing them in a raceway, that is, in a passage where you have access to the pipe?

Mr. Yoakum: The question is objected to on the ground that the practice today is not in issue.

The Court: Sustained. I suppose that the installation of pipe is a great deal different than it was in 1914. It might be good practice now to do something else.

Mr. Verleger: Your Honor, the only thought I would [425] have in that connection is the extent to which your installation doesn't correspond to what is good practice today is something that perhaps ought to put you on notice.

The Court: I think you are trying to extend the area of your case here.

Mr. Verleger: Thank you, your Honor. Then I will close. No further cross.

Mr. Yoakum: Just one question.

(Testimony of Frank E. Alderman.)

Redirect Examination

By Mr. Yoakum:

Q. This Exhibit G-3, is the evidence of that graphitic corrosion apparent to the naked eye when you have a cross section of it? Can you see it on the top here?

The Court: When you go down and look at the pipe in the ground, you don't have a cross section like that. You are just looking on the outside, the exterior of it.

Mr. Yoakum: I understand that. I just wanted, your Honor, to know if it is the fact that in this piece we took—of course, we intentionally took a better piece than right next to where it had given way—there was graphitic corrosion and you can see it by looking at the cross section, not on the outside of the pipe.

The Witness: I think this piece shows the whole picture very clearly in that in the cross section—I don't [426] know whether this glass will help you any—in the cross section the extent of the graphitic corrosion can be followed. There is a little here, and here, where the crack occurred it can be seen to have extended about halfway through the middle and die out over in here again. That is about the only real evident one in about a fourth of a diameter there. However, if you look at this same area on the surface, there is no evidence of anything having taken place there in the way of

(Testimony of Frank E. Alderman.)

corrosion. A great deal of the iron has left that pipe and yet it doesn't show on the surface because it didn't displace the carbon.

Q. (By Mr. Yoakum): That is a sheath of graphite or carbon?

A. Largely so. There is undoubtedly some iron in it. Also, it is probably some of the iron which appears not to have been affected may have been slightly affected, but there is what appears to be a sharp line of demarcation.

Mr. Yoakum: That's all, your Honor.

Mr. Verleger: I just have one further question in this connection.

Recross-Examination

By Mr. Verleger:

Q. Just so I am clear, was one of the sections, this piece here, right off the end of the piece that was left in [427] the ground?

A. Yes. We have the photographs that will show it quite clearly.

Mr. Yoakum: I don't think you heard the question.

The Witness: Oh, wait. That was left in the ground? I am sorry. I almost didn't understand the question. You say that was left in the ground?

Q. (By Mr. Verleger): Yes.

A. No. It was one of the pieces which was taken out. Do you have this photograph?

The Court: The question was whether or not

(Testimony of Frank E. Alderman.)

the section you took off was adjacent to the piece that was left in the ground, if you know.

The Witness: I am not certain.

Q. (By Mr. Verleger): I see. Just one further question.

I take it the principal danger with graphitic corrosion in a piece of pipe like this, where it has progressed only part way in, is not that it is about to let go, but it indicates a condition which is progressing and which as it gets further will cause failure, isn't that about it? A. Yes.

Q. So if you find some graphitic corrosion in a pipe which has progressed substantially, even though it hasn't gone [428] clear through, it does indicate danger?

A. Yes, that's right. In order to verify these test results, I did run a computation of what I thought the bursting strength might be on this pipe, assuming that the corrosion hadn't gone any further than could be seen, and that the pipe had a tensile strength of 20,000 pounds per square inch, which is probably about what the pipe had in those days, that cast iron had in those days, the computation indicated it should burst at about 1,800 pounds per square inch. So apparently it has gone somewhat further than can be seen even on the cut section.

Q. The problem with graphitic corrosion is as it penetrates it goes clear through eventually, so you get leaks, which may be either large or small, that is about it, isn't it? A. Yes.

(Testimony of Frank E. Alderman.)

Q. So that again the existence of a leak in and of itself is some warning of graphitic corrosion?

A. Well, the evidence of leaks would be evidence of corrosion if they are that type of leak.

Q. And if your meter readings, for example, indicated there were some leaks, you wouldn't be able to tell whether it was graphitic corrosion or joint leaks or what not, unless you got down there and looked, would you?

A. Well, usually on this type of break, I think the leak will develop very fast. Certainly it will develop over [429] a period of time. It will progress, and it will increase because of the nature of the deterioration. You see, the water going through a small hole, if the graphitic corrosion had taken place clear through the pipe enough to make a small hole in one spot, the action of water leaking out of that under pressure would rapidly cut the hole and make it larger, so that over a period of time, days or months, it could be expected to increase rather rapidly in size, and in this case it probably increased in a matter of minutes into a large break.

Q. But to get back to my question, specifically, if you have a leak, you can't tell what the cause of it is unless you get down in there and find out.

A. If you have a leak, no, you can't tell what the cause is until you look at it.

Mr. Verleger: Nothing further.

(Testimony of Frank E. Alderman.)

Redirect Examination

By Mr. Yoakum:

Q. The fact that in a pipe system such as we had down here at the harbor, that fire line containing about between five and six thousand feet of pipe, in which there were approximately a leaded joint every 10 feet, in which there were 36 fire alarm test valves, which were turned on periodically to make a check to see if the system was working, would the [430] fact that you had a leakage in the entire system of, say, one hundred cubic feet of water a day over a period of time going back several months prior to the date of this break, would that, in your opinion, be any indication of the fact that this particular pipe that gave way on March 12th was dribbling water during those preceding months?

A. No; it wouldn't, with that many valves in the system alone. I would think it would be unusual if it didn't leak some. Normally, the place to look first would be at each of those valves. That would be the thing I would suspect of leaking first of all.

Q. If your wife or child leaves the faucet on in the bathroom at home, how much water will that run in the course of 24 hours, have you any idea?

The Court: It depends on how much the valve is open.

(Testimony of Frank E. Alderman.)

Mr. Verleger: Or the water pressure.

The Court: If you leave it open full, it would flood the house for you.

I would like to ask the witness a question.

Mr. Yoakum: I am through.

The Court: Would you consider a leak of 100 cubic feet a day excessive in a system this size?

The Witness: If it is all leakage and none of it is used, I think that would be excessive. [431]

The Court: Assuming that there was some leakage of 100 cubic feet a day here, do you think somebody should have gone around to investigate to see where the water was going to here, or where it was coming from?

The Witness: Yes, I think so. I understood that they did find that periodically there was use from these lines and that probably accounted for the water going through the meter.

Mr. Verleger: Object to the conclusion.

The Court: Just assume that we haven't got any evidence here of any use, we haven't got any evidence except conjecture that somebody might have turned on a valve or used any of the water. We just have going through the meter 100 cubic feet of water a day.

Mr. Yoakum: Pardon me, your Honor. We have testimony that those valves were turned on periodically for checking the alarm system to see if it was working.

The Court: I don't know what you mean by periodically, once a month, once every six months,

(Testimony of Frank E. Alderman.)

or what. Nobody has testified, as far as I know, that they were turned on. I think there has been a lot of speculation that they might have been turned on.

Mr. Yoakum: Mr. Brashier testified positively from time to time. I know he didn't tell you the month, the interval, but he said the fire underwriters come around and [432] check those valves to see there is water in the system to function.

The Court: I have no other questions.

Mr. Verleger: I have nothing further.

Mr. Yoakum: Did he answer your question?

The Court: No. I dropped the question.

The Witness: I would say in the absence of any other evidence it is being used, that it is something to look into. These detector meters are a peculiar thing. It is very difficult to tell exactly what is happening as far as quantity is concerned. They are merely an indication water has gone through, but as to the exact quantity of water, they are not designed to tell you that, because water can be used through the check valve of which this meter is a bypass and used in large quantities, and only a small portion would go through the meter, or if a hose were opened and water were taken at a considerable rate, this meter would still only register a small portion of that. So it isn't an indication of how much water went through, and is not intended to be, but only an indication that some water did go through there.

I was in on an investigation which was very

(Testimony of Frank E. Alderman.)

puzzling where we had a negative reading on the meter day after day. It took five or six of us all day long and a lot of checking to find the reason why the meter was running backward and giving us that reading. They can do some very tricky things. [433] We finally found out where it was, but they are not an accurate measure of quantity of water.

The Court: Does cast iron pipe sweat?

The Witness: No.

The Court: You don't lose any water that way?

The Witness: Through the pipe? I would say not.

Q. (By Mr. Yoakum): The testimony here is that this line is what one witness termed a dead end. Is that a common term?

A. Well, it means it runs out into a system of pipes which have no outlet. That is one reason these meters are sometimes rather tricky in the measurement of water. It is what we ran into in that particular instance. Each of those little lines having sprinklers had air in it, and there was a considerable amount of air out at the end of these lines which stayed there. As the pressure changed, the water flooded back and forth through this meter, and in the instance I speak of a check valve which it bypassed could open in one direction, but not in the other, so it let the water in, but when it went back out, it come through the meter. Each time the water pressure expanded or contracted the air in the end of each one of these dead ends, and

(Testimony of Frank E. Alderman.)

I believe what the witness meant was that these pipes all end without an outlet, so that the water cannot circulate through them.

Q. That being the case, are you familiar with the term [434] of surge in the line? A. Yes.

Q. Would a line so situated as this, that is, a dead-end line, be subject to surges in the main source of water supply?

A. It would be subject to probably considerable variations in pressure as valves were opened on the line and as water pressure was used out of it for other purposes along the line.

Q. If you have surges in the main line, would that cause any reading, any flow through these by-passes?

A. I don't know. It is difficult to say. I believe one witness testified it could, and I would have to examine that much more thoroughly as far as the fire system itself is concerned. The alarm system, I believe he testified it could go through the valve and out to your drain without setting off the alarm. But I don't know that of my own knowledge.

Q. Would you consider in a system of this magnitude and located in the ground, as it is here, that because of a reading of 100 cubic feet of water per day through three of those detector meters, or an average of 33 cubic feet per day through each of them, that prudent practice would require digging up the buried pipe?

A. No. First of all, if I were looking for it, I would look for the valves to be the source, either

(Testimony of Frank E. Alderman.)

leaking or being [435] opened by unauthorized personnel. But in the absence of water coming to the surface, you just wouldn't know where to dig, to try to start digging for it.

Mr. Yoakum: That's all.

The Court: Any other questions?

Mr. Verleger: No questions.

The Court: May the witness be excused?

Mr. Verleger: Yes, as far as I am concerned.

The Court: Court will now stand in recess until 15 minutes after 11:00.

(Recess.)

Mr. Yoakum: I have a couple more questions I would like to put to the witness.

The Court: All right.

Q. (By Mr. Yoakum): I want to show you Exhibits 25, 26 and 27, which are Los Angeles Water Department meter reading sheets covering the three fire line meters or detector meters that we have in the fire line here, and I want to direct your attention to the readings for the three months preceding the time of this break. You will note that on Exhibit 26 the reading was 100, 100 and 0 for those three months.

A. That is for January, February and March, 1956?

Q. Yes, sir. That is the three readings immediately preceding the break. [436]

On Exhibit No. 25, you will note that they read 800, 600 and 500.

(Testimony of Frank E. Alderman.)

On Exhibit 27, you will note they read 2,500, 3,800 and 2,900. A. Yes.

Q. Having in mind those readings, do you have an opinion as to whether that would be any indication that there was a quantity of water escaping from this subject pipe that gave way on March 12th?

A. No. I don't think that these readings indicate that type of leakage. I think that they would be much less constant and they would have no reason to reduce, as some of them did. They would at least get progressively greater, and I think they would get greater so fast that probably even within the same month it would be evident on the surface, rather than just the readings on the meter, because cast iron, especially, which has been attacked by graphitic corrosion, would be very soft and water has a great cutting power, and once a hole developed, it would undoubtedly open that whole surface. It could and would probably blow out, as this apparently did, but certainly would not stay the same, as steel often does, being a much harder material and less easily cut. Steel pipe would have a hole in it which would stay the same size for a long period of time. But I don't believe that that would occur in cast iron with this type [437] corrosion.

Q. You think if there had been any leak there in the subject pipe, that those readings, instead of varying up and down, would have been consistently on the increase?

(Testimony of Frank E. Alderman.)

A. At least that it probably would have gone so fast it wouldn't even have shown up on the readings. It would probably have taken place all in the same month.

Mr. Yoakum: That's all.

Mr. Verleger: One question.

Recross-Examination

By Mr. Verleger:

Q. First, with this pipe layout and this chunk as large as the size of your hand gone at that point, the flow through the pipe would open up the check valve and you would not get any reading at all through the detector meters, or nothing substantial?

A. Nothing substantial. You would get a proportional reading, but it would be relatively small.

Q. Yes. I remind you of the fact that this break took place on March the 12th. There is a reading here for April 4th, which is the next reading after that, which shows 1500 cubic feet. That itself would presumably have to have been a flow through that meter, the bulk of it, independent of this break, I take it, isn't that right, independent of the big break? [438]

A. Well, I don't know. Some would go through during the break. How much, it is difficult to say, but there would be a proportionate amount go through the meter.

Q. I call your attention to the fact that on

(Testimony of Frank E. Alderman.)

5/3/56, which I presume was after this was repaired, the flow through this particular meter drops to zero.

Mr. Yoakum: The question is objected to on the ground it indulges in an assumption that it was repaired. There is no evidence that it was repaired. If we are going to speculate on it, I think it was shut off entirely.

Mr. Verleger: Well, let me rephrase the question.

Q. At any rate, I think we can assume that on 5/3, that is after this thing had taken place, there was no longer any water flowing through this particular leak.

The Court: I think you are going to have to establish when the repair was made and when the water was turned back on. We haven't any evidence of when the repair was made or when the water was turned back on.

Mr. Verleger: I think, your Honor, Mr. Brashier testified they went in there and fixed the thing.

The Court: They did, but he didn't say when.

Mr. Verleger: He didn't give the date.

The Court: I don't have any recollection he testified it was completed on a certain day.

Mr. Verleger: May I call the court's [439] attention, respectfully, to the following fact, that is, that this does show, these records show affirmatively that the meter itself is on.

Mr. Yoakum: On the contrary, they show just the opposite, because the aggregate cubic foot reading here is the same month after month here.

(Testimony of Frank E. Alderman.)

The Court: Just don't argue here, because the exhibits are in the evidence.

Mr. Yoakum: I beg your pardon.

The Court: I don't think the readings mean anything at all unless you can establish when the repair was made and when the system went back into operation. If you can show there were no further leaks, it might be some evidence that these leaks were indication of trouble.

Mr. Verleger: Then I have just one further question of this witness, your Honor.

Q. This system, the plans indicate here that it has valves that permit you to cut off various parts of the system. Did you note that when you were down there? A. Yes.

Q. If you had a flow and you wanted to locate where the flow was localized, I take it you could turn off different parts of it and see whether you still had the leak, could you not?

A. Yes. [440]

Q. That would limit greatly the area where you had to dig to find the leak, would it not?

A. Yes, it would reduce it.

Mr. Verleger: Nothing further, your Honor.

Mr. Yoakum: Nothing further.

May this witness be excused?

The Court: Yes, he may be excused.

(Witness excused.)

Mr. Yoakum: Your Honor, at this time we

offer as Exhibit T a certified copy of City Ordinance 101484.

The Court: It may be received.

The Clerk: Defendant's Exhibit T in evidence.

(The document referred to was marked Defendants' Exhibit T and was received in evidence.)

Mr. Yoakum: Defendant rests.

Mr. Verleger: Plaintiff has nothing further.

The Court: Well, it is half past 11:00 and I assume you all want to say something after a week of trial.

Mr. Verleger: Your Honor, I wonder if we might have argument at 2:00 o'clock.

The Court: Yes. I was going to suggest we recess until 2:00 o'clock.

Before we recess, I would like to ask the attorney for the plaintiff a question. Your complaint is based on negligence. Do you contend you can recover even though you do not show negligence? [441]

Mr. Verleger: Your Honor, I would like, if I may, to phrase my answer this way. The courts have said in this particular context—well, I think negligence involves two things. It involves the duty of care and a breach of it.

The Court: Suppose I would fine that the City wasn't guilty of any negligence. Can I still find for the plaintiff on the theory that it was the City's water that caused the damage, or is the City responsible regardless of negligence?

Mr. Verleger: Your Honor, I think the City made an economic decision, and I think this is

what happened. It was cheaper to leave the pipes in than to play with them.

The Court: Can you give me a case based on economic decision?

Mr. Verleger: Well, your Honor, after lunch I will see what I can do.

The Court: I am asking the question because of the testimony of your own witness. You know, he testified that P. G. & E., if there was a break, paid off regardless of the fault.

Mr. Verleger: Yes.

The Court: That might be a policy of P. G. & E. I never knew P. G. & E. to be a Santa Claus. There might be some authority that regardless of the question of negligence, [442] the City is responsible. I wish you would see what you can find in regard to that.

Now, there is one other problem that hasn't been stressed during the trial, and yet I suppose that the evidence is in relative to the question of a waiver of the right to collect damages because of negligence. I would like to hear from you about that this afternoon. Even though I would find in favor of the plaintiff, that is, on the ground of negligence, I think there may be a clause here that precludes the plaintiff from recovering, that is, that the plaintiff or the plaintiff's predecessor have agreed not to hold the City responsible.

Mr. Yoakum: Very well. I will discuss that. The matter is discussed somewhat in the briefs, but I will be prepared to discuss it, using my brief primarily.

The Court: I might say I do not expect to decide this case from the bench.

Mr. Yoakum: I didn't hear you, your Honor.

The Court: I say I do not expect to decide this case from the bench. I will give you a chance to file some briefs, if you want, on these problems.

Mr. Yoakum: I would be glad to file any briefs, further briefs, that the court thinks will help. I think I have pretty well briefed the question, but I can always be taught something more, and if there is anything more that can help, I want to try to help the court. [443]

The Court: I am satisfied. If you don't want to file a brief, don't file it. I am just giving you the opportunity, if you want to file any additional briefs, but I am satisfied from the briefs that have been filed. I can go back and look at your authorities upon these various points.

But my experience has been that after the evidence is in and you know what the testimony is, that you are better qualified to discuss the matter than you are before the trial, when you just know what your testimony is going to be, or you hope it is going to be, and you just suspect what the testimony of the other side is going to be.

Mr. Yoakum: Well, of course, we can argue a little more categorically now, because we do have the record here and it may be a review of the salient facts and a reference to the authorities would be of help. But let's defer that matter to the end of the day.

The Court: That's all right. We can decide on that this afternoon.

We will now recess until 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day, at which time the court heard argument of counsel.) [444]

Certificate

I hereby certify that I am a duly appointed, qualified, and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 16th day of February, 1959.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed February 27, 1959. [445]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below

constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 120, inclusive, containing the original:

Amended Complaint, filed 11/21/56.

Answer of City of Los Angeles to Amended Complaint.

Answer to Interrogatories propounded to Defendant City of Los Angeles by Plaintiff.

Additional Answers to Interrogatories Numbered VIII, XIII, XIV, XVI, and XVII, submitted by Defendant City of Los Angeles as required by Court Order made February 25, 1957 (marked as Plaintiff's Exhibit 28).

Second Amended Complaint, filed 8/12/58.

Answer of City of Los Angeles to Supplemental Interrogatories.

Stipulation and Order, filed 8/12/58 re filing of Second Amended Complaint, etc.

Stipulation and Order, filed 9/26/58 re trial on issue of liability only, etc.

Memorandum of Opinion.

Objections to proposed Findings of Fact by Grace & Co.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal.

Application for order extending time for filing and docketing record on appeal and order thereon, filed 1/23/59.

Appellant's Designation of record on appeal.

Concise Statement of Points on which Appellant intends to rely.

Appellee's Designation of additional portions of record, proceedings, evidence, to be included in record on appeal.

Application for order extending time for filing and docketing record on appeal and order thereon, filed 2/25/59.

B. Three volumes of Reporter's Official Transcript of Proceedings had on: October 7, 1958; October 8, 1958; October 9, 1958, and October 10, 1958.

C. Plaintiff's Exhibits 1, 21, 22, 23, 24, 25, 26, 27, 28, 28A and 29. Defendant's Exhibits B, C, G, G-1, G-2, G-3, I, K, N, O, P, Q, R, S and T.

(Note: Due to bulkiness of Plaintiff's Exhibit 1 and Defendant's Exhibits G-1, G-2 and G-3, are being retained in Clerk's office pending further instructions from Clerk of Court of Appeals.)

Dated: February 27, 1959.

[Seal]

JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16388. United States Court of Appeals for the Ninth Circuit. Grace & Co. (Pacific Coast), a Corporation, Appellant, vs. The City of Los Angeles, et al., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: March 2, 1959.

Docketed: March 3, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 16388

GRACE & CO. (Pacific Coast), a Corporation,
Appellant,
vs.

THE CITY OF LOS ANGELES, a Municipal
Corporation, et al.,
Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Pursuant to local Rule 17, subdivision 6, appellant, Grace & Co. (Pacific Coast), states that it intends to rely upon each and all the points set forth in its "Concise Statement of Points on Which Appellant Intends to Rely on Appeal," filed in the District Court of the United States, Southern District of California, Central Division, on January 28, 1959, and constituting pages 112 and following of the transcript of record in this appeal, and appellant, Grace & Co. (Pacific Coast) hereby adopts said statement of points as its statement of points on which appellant intends to rely as required by said Rule.

Dated: This 18th day of March, 1959.

McCUTCHEN, BLACK,
HARNAGEL & SHEA,
PHILIP K. VERLEGER,
HOWARD J. PRIVETT,

By /s/ HOWARD J. PRIVETT,
Attorneys for Appellant Grace & Co. (Pacific
Coast).

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 19, 1959.

